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Supreme Court, U.S.
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# In the Supreme Court of the United States

CRAIG MASON,

*Petitioner,*

v.

COLUMBIA BASIN COLLEGE, ET AL.,

*Respondents.*

*On Petition for Writ of Certiorari to the Court of Appeals of the State of Washington, Division III*

## PETITION FOR WRIT OF CERTIORARI


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May 5, 2010


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## QUESTION PRESENTED

Has Constitutional Due Process been violated when a punitive sanction is levied against a party, based upon relief beyond the scope of the original motion, based upon an imputed license to commit future torts with impunity against the sanctioned party, and when there has been no notice to the sanctioned party, and no opportunity for the sanctioned party to be heard?

## RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

*Plaintiff-Appellant and Petitioner:* Craig Mason

*Defendant-Appellees and Respondents:* Columbia Basin College, Columbia Basin Board of Trustees, Lee Thornton, Rich Cummins, Meg Woods, and the marital community of Meg Woods and Rich Cummins, David Shaw and the marital community of David Shaw and Jane Doe Shaw, Deborah Meadows and the marital community of Deborah Meadows and Mike Grinnell, Ruben Lemos and the marital community of Ruben Lemos and Jane Doe Lemos, and Bill McKay and the marital community of Bill McKay and Jane Doe McKay,

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## PETITION FOR A WRIT OF CERTIORARI

Craig Mason respectfully petitions for a writ of certiorari to review the opinion and judgment of the Washington State Supreme Court, and the bases for the Petition thereto.

## OPINIONS BELOW

The Denial of Petition for Review is found at *Mason v. Columbia Basin College*, 224 P.3d 773 (Table), (Wash. 2010), January 5, 2010, and is reproduced in the appendix at 15a.

The Division III unpublished opinion can be found at *Mason v. Columbia Basin College*, 150 Wash. App. 1016 (Wash. App. 2009), May 14, 2009, and is reproduced in the appendix at 1a, and the order denying reconsideration is at 17a.

The Trial Court Order of Summary Judgment can be found in the appendix at 11a, and the Trial Court setting of a hearing for sanctions and fees, set for December 12, 2008, can be found in the Appendix at 19a.

## JURISDICTION

The Denial of the Petitioners' State Court Petition for Review was entered on January 5, 2010, and upon Petitioner's timely Motion for More Time Justice Anthony Kennedy extended time, up to and including May 5, 2010. The questions to be reviewed were raised in the courts below under the 5th and 14th Amendments to the U.S. Constitution.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

*Fifth Amendment to the U.S. Constitution:* No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Fourteenth Amendment to the U.S. Constitution, Section 1:* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Wash. Rev. Code § 4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense*: In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of

attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

## STATEMENT OF THE CASE

As applied to the states by the Fourteenth Amendment to the U.S. Constitution, the guarantee of Mr. Mason's due process rights were violated by state proceedings when relief, including a very penal sanction, was ordered against him, beyond the scope of the Respondents' motion, and upon the trial court's *sua sponte* theory, of which Mr. Mason had no reasonable notice. The Court of Appeals, recognizing the trial court's theory, that Mr. Mason had provided Columbia Basin College with a license to commit future torts against him, was untenable, simply refused to accurately address the trial court's actions, and affirmed the trial court on yet a new theory, again without any opportunity for Mr. Mason to be heard, or to have due process of law, or fundamental fairness, before losing his claims by omission, and before being sanctioned at a level greater than many criminal penalties, and without good cause.

## A. Factual Summary

This case arises from Mr. Mason's departure from teaching at Columbia Basin College, in Pasco, Washington, after negotiating a nominal severance agreement, partially in writing, which included a crucial oral guarantee that three faculty currently under administrative attack would not suffer any repercussions after the departure of Mr. Mason.

Mr. Mason taught at CBC from 1988 to 2004, except for 1996 to 1997, when he taught at Eastern Washington University, and received an offer of immediate tenure to remain at EWU. At the time EWU made that offer, the new President of CBC, Lee Thornton, who had cultivated a special relationship with Mr. Mason during the 1995-96 academic year, specially requested that Mr. Mason return to CBC to assist in the management of academic and personnel matters at CBC. Mr. Mason returned to CBC and, while continuing to teach fulltime, undertook numerous difficult administrative projects at the request of Lee Thornton.

Mr. Mason had been dragged into administrative matters at CBC beginning in 1992 when Mr. Mason had happened to be the Association of Higher Education President for CBC when the then-President, Marv Weiss, violated due process in an attempt to summarily fire an English Department faculty member for sexual harassment.

The College administration had spread rumors about the English teacher for a year before publicizing in the media that they were suspending the faculty member for sexual harassment, and very publicly

locking the faculty member out of his office, and marching him off campus, all in violation of the AHE contract and in violation of statutory and constitutional due process. Due to the depth of the publicity campaign, not even the regional faculty union came to the English teacher's defense. Mr. Mason insisted upon a fair investigation.

President Weiss threatened to fire Mr. Mason. Nonetheless Mr. Mason undertook an investigation which ultimately proved that all of the accusations against the teacher were unfounded. The statewide union then stepped back in, and, with Mr. Mason assisting, won an arbitration and all back pay for the faculty member. President Weiss continued to violate due process in various ways, and was opposed by Mr. Mason, until Weiss was fired in 1994.

Mr. Mason participated in hiring Lee Thornton, who entered the CBC presidency in 1995, and subsequently felt responsible for his performance.

Lee Thornton did not fire prior administrators, and these managers continued to select one to three faculty members per year about whom to spread rumors for months, and then try to fire. Despite Lee Thornton's reliance upon Mr. Mason, Lee Thornton would not accede to Mr. Mason's request that he discipline, or fire, his rogue administrators. Again and again, the rumors would begin, and then some unjustified employment actions would be taken as the first-step to an illegitimate firing, and eventually Mr. Mason would have to get involved to prevent wrongful firings. In the interim, the targeted faculty had suffered much distress. Always, at the "last minute," Lee Thornton

would back Mr. Mason, and prevent the wrongful firings.

Prior to these events, Mr. Mason had graduated with high honors from the University of Washington School of Law, where he had served on the Law Review, and he was invited to Stanford to work on First Amendment Law with Thomas Grey, based upon the strength of his U.W. student Law Review article: *"Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to Mozert v. Hawkins County Public Schools and Smith v. Board of School Commissioners*, 63 Wash. L. Rev. 445 (1988). Additionally, Mr. Mason, after working for one of Seattle's top law firms, was offered a fulltime associate position with Preston, Thorgrimson, Ellis and Holman (now merged with K-L Gates), working in municipal law.

Instead of following those pathways, Mr. Mason went to teach at Columbia Basin College to pursue his lifelong interest in the reform and improvement of the American educational system. His original concern for pedagogy remained with Mr. Mason, and this was why he remained in the classroom through all these years of heavy administrative involvement. At the trial court level, defense counsel made much of the fact that Mr. Mason had no formal position during these years. However, Mr. Mason had twice turned down the Vice-Presidency at CBC, and was active in every development of curriculum, policy, or procedure, and in all major decisions, for over a decade.

To remain in the classroom, Mr. Mason performed these extensive administrative functions, without extra compensation, and to the annoyance of the

middle administrators who would conspire ceaselessly against Mr. Mason.

Despite having no formal position, Mr. Mason had a clear "informal position" at CBC. During these years, from 1995 to 2002, the special relationship and trust between Mr. Mason and President Thornton increased, as Mr. Mason managed the self-study for the 2000 accreditation, made peace with faculty regarding the adoption of "assessment" procedures demanded by the state legislature, and otherwise undertook difficult, and highly "political" administrative projects for Lee Thornton.

The rogue administrators resented Mr. Mason, but, since Mr. Mason gave them no excuse or opportunity to accuse him of any rule or procedural violations, there was little revenge they could take, apart from attempts at damaging rumors, trying (and failing) to cultivate student complaints, and slyly subverting policies and procedures.

After the year 2001, Mr. Mason began to grow more weary of Lee Thornton's refusal to control rogue administrators, especially as Mr. Mason had tired of the pointless attempts by these administrators to express "power" by psychologically damaging faculty and staff with attempts at unjustified firings that Mr. Mason had to halt. Lee Thornton's fear of confronting these aggressive middle managers was finally catching up with CBC as an institution, and it was eroding Mr. Mason's confidence that Lee Thornton would ever grow into his job.

Mr. Mason entered the Washington State Bar in 2002, to begin a gradual transition back to law. Mr.

Mason also became politically more active in 2002. A Trustee literally blackmailed Mr. Mason not to enter politics or the Trustee threatened that he would reveal the (false!) character assassinations of him, that the CBC middle managers passed to the Trustee, to the state Democratic Party. When the Trustee made good on his threat, Mr. Mason's moral exhaustion about CBC increased.

A cheating scandal at CBC finally forced Mr. Mason to leave CBC. In 2003, Cliff Wakeman, an English teacher, discovered excellent statistical evidence that one faculty member had helped his students cheat on the (formally anonymous) exit exam out of Remedial English. An investigation was warranted as another faculty member had heard the suspect English teacher boasting about defeating the accountability of this assessment of student and teacher performance.

Coterminous with this, in 2002 and 2003, Mr. Mason had begun withdrawing from administrative participation at CBC, and had, for the second time, in late 2002 to early 2003, turned down an offer to be appointed the Vice-President of CBC. Instead, another person whom Mr. Mason trusted and recommended, Rich Cummins, was appointed CBC Vice-President by Lee Thornton.

However, unlike the role Mr. Mason had played in keeping Lee Thornton on the ethically correct path, often against Lee's initial resistance, Rich Cummins catered to Lee's desire to avoid confrontation. Hence, in the spring of 2003, it came time to investigate the cheating on the English exit exam, Lee Thornton offered Rich Cummins the eventual presidency of CBC

(which Mr. Cummins now has) if Mr. Cummins would oppose investigation into the cheating scandal. This increase in corruption was finally too much for Mr. Mason.

Mr. Mason now had to choose to turn on two friends and compel an investigation, or depart from CBC as a final act of respect for dying friendships. Rather than turn on two (former) friends, albeit two friends who had turned on him regarding the cheating scandal, Mr. Mason negotiated his departure from CBC, expecting reciprocal respect and fair dealing, after years of special relationships.

The separation agreement negotiated between Lee Thornton and Mr. Mason had two parts: (a) the written component of severance of $140,000 (two years' pay), and (b) the oral agreement that the three faculty currently under attack by CBC's rogue middle management would not suffer from Mr. Mason's absence.

These oral terms were vital in that (a) Mr. Mason could not leave with known victims unprotected, and (b) those pending victims could be targets of additional aggression aimed indirectly at Mr. Mason, knowing as they did that Mr. Mason had given his word to these three faculty members, based upon Lee Thornton's promise, that they were safe.

Lee Thornton used his special relationship with Mr. Mason to have Mr. Mason believe him when Thornton swore an absolute oath that these three faculty would be safe. These faculty are: Cliff Wakeman (under attack for exposing the statistics of cheating on the exit exam); Matt Mathesius (under attack for

supporting Mr. Wakeman, and for pushing the envelope a bit with political humor); and Farhad Arshad (under attack because he pushed students to think very critically in all directions, always offending a few students and colleagues, while intriguing most, well within the bounds of academic freedom and propriety).

Prior to Mr. Mason signing his separation agreement, Lee Thornton again vehemently promised Mr. Mason that these faculty would suffer no negative employment repercussions of any kind. Lee said that the State Attorney General would not let him put these terms into the writing, because then it would look like a "settlement agreement," which Lee was not authorized to draft. But President Thornton swore to the highest heavens that Mr. Mason could trust him in this regard.

After Mr. Mason signed the separation agreement, and during the week-long revocation period, Mr. Mason again met with Lee Thornton and told President Thornton that Mr. Mason would revoke his signature without additional guarantees that these three faculty members would be safe from any negative workplace consequences. There were ominous signs that some middle managers were already stirring trouble for Matt Mathesius, hectoring him about political cartoons on his office window.

Lee Thornton explicitly reiterated fresh and emphatic guarantees to Mr. Mason, regarding all three faculty. These oral guarantees are enforceable under Washington law, especially as Mr. Mason provided the fresh consideration of not revoking his signature, and as Mr. Mason's reliance was knowingly induced.

These oral terms were absolutely relied upon by Mr. Mason, and without these oral terms in the partially integrated agreement, there would have been no finalization of the separation agreement, and/or it would have been revoked during the revocation period. The oral terms were the basis of the bargain.

The Full Agreement had oral and written terms. (Despite the trial court's conflation of the Full Agreement with a "written partial integration." These are quite logically distinct concepts and things.)

The separation agreement proposed Mr. Mason's departure from CBC in June of 2004.

Within days after the revocation period closed, Rich Cummins and other named defendants, with Lee's knowledge and acquiescence, tried to fire Farhad Arshad. Mr. Mason had to spend the winter and spring of 2004 saving Mr. Arshad's job. By early 2004, CBC administrators were making unfavorable changes in Cliff Wakeman's schedule, and they were trying to harass Matt Mathesius into quitting.

This was a knowing, intentional, and cruel attempt to thwart the basis of the bargain, and to strike Mr. Mason in the heart of his integrity, by making a mockery of his promises to these faculty.

Without Mr. Mason's presence, Farhad Arshad finally had to file suit, settle the case, and leave CBC. Matt Mathesius had to file a state tort claim and use union grievance procedures to protect his job. Cliff Wakeman was also retaliated against. Given these

wrongs, Mr. Mason determined to file the present suit, when possible, with the statute of limitations in mind.

Further, as Matt Mathesius filed in trial court declarations, CBC rogue administrators spread rumors, at CBC and in the community, in 2003 through 2005 that Mr. Mason was driven from CBC for misdeeds, and CBC otherwise defamed and professionally harmed Mr. Mason subsequent to the agreement, providing the basis for the post-agreement, personal torts, pled in Mr. Mason's Complaint.

Mr. Mason timely filed the current suit, in 2007, alleging personal, post-signing, torts, as well as the breach of oral terms.

Mr. Mason provided sufficient facts to the trial court prior to the June 20, 2008 summary judgment motion to raise genuine questions of fact on all claims.[1]

## B. Procedural and Due Process Violation Summary

**1. Trial Court:** At the trial court, Columbia Basin College (hereinafter, "CBC") brought a summary judgment motion, on June 20, 2008, asking the trial court to determine that Mr. Mason's severance agreement with CBC was a full integration between the parties at the time of signing. 65a This was brought against Mr. Mason's contention that the

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[1] Mr. Mason provided sufficient evidence despite the trial court excluding some documents regarding Farhad Arshad that were properly sworn and verified, and despite the trial court denying Mr. Mason's Wash. Super. Ct. Civ. R. ("CR") 56(f) Motion.

writing was a partial integration of a Full Agreement that included oral and written terms. 30a-59a. CBC's motion requested that the trial court determine that the "context rule" of contract interpretation in Washington State did not apply to this case, and that Mr. Mason's allegations of oral terms (regarding the faculty) be excluded.

Mr. Mason's complaint against CBC also included (a) personal torts for actions taken by the Defendants subsequent to the agreement, and (b) fraud, misrepresentation, and breach of special relationship causes of action, which would be outside of contract law, and (c) contract claims for agreements made subsequent to the signing of the writing. 30a.

The trial court granted CBC's summary judgment motion, during the course of which the trial court made explicit statements that Mr. Mason had waived the right to sue for any future torts CBC might commit against him. 23a-29a

The trial court stated that any complaint for post-signing agreements, or for post-signing torts, committed by CBC, against Mr. Mason, were waived by Mr. Mason's separation agreement. 24a. In other words, the trial court held that the severance agreement at issue established a waiver of future torts by CBC, against Mr. Mason.

The trial court held, construing the facts in favor of the moving party, that the separation agreement was a total integration. Then the trial court went further, moving beyond any proposition recognized in the law of any state, and held that the written separation

agreement granted CBC a license to commit future torts against Mr. Mason.

Next, the trial court found that Mr. Mason's entire suit was without merit, even though (a) the entirety of the suit was not at issue on the Defendants' summary judgment motion – only the question of whether the document was a full or partial integration was properly at issue, and (b) the ruling was beyond the scope of the motion. Furthermore, the trial court went further and declared that (c) Mr. Mason's other personal causes of action were frivolous because the separation agreement gave CBC a waiver to commit future torts without being sued. 24a-28a.

Finally, the trial court sanctioned Mr. Mason under the Revised Code of Washington, 4.84.185 (frivolous suit statute), for CBC's attorneys' fees. A hearing to determine fees was set for December 12, 2008. 20a.

On September 12, 2008, a hearing was held, without notice to Mr. Mason, and fees were assessed against Mr. Mason over $23,000. Mr. Mason was later informed, as he prepared for the 12/12/08 hearing, that judgment had been entered on September 12, 2008.

In all events, the trial court's remedy to CBC was beyond the scope of CBC's motion. As relief beyond the scope of the motion, it violates basic due process, as it was granted without proper notice and opportunity to be heard. Additionally, the waiver of future torts was not in the contemplation of either party, and was never part of the separation agreement, and could not have been imagined as part of the summary judgment motion. Further, such a waiver of future torts -- a

license to commit future wrongs -- would be against public policy.

Finally, Wash. Rev. Code § 4.84.185 sanctions can only be granted if an entire suit is frivolous, and sanctions were by definition error since the entire suit was not within the scope of CBC's summary judgment motion. And yet this financial penalty, more severe than many penalties levied in the criminal context, was imposed against clear legal precedent, and without notice and opportunity to be heard, and without due process of law. 28a

**2. Washington State Court of Appeals:** The Washington State Court of Appeals (Division III) addressed the issue of the waiver of future torts, (a) by claiming that the trial court had made no such ruling, despite the court transcript, and (b) by denying that Mr. Mason had filed any torts on his own behalf. Compare 7a and 30a-59a.

Mr. Mason had prepared for oral argument before the State Court of Appeals, which was cancelled the morning of oral argument, when CBC's attorney suddenly announced he would not be appearing. Subsequently, no oral argument was allowed. Although oral argument is not always a constitutional aspect of due process, in this instance it would have allowed Division III to become aware of the issues overlooked by the trial court.

Reconsideration was denied by the State Court of Appeals, terminating review without any substantive opportunity for Mr. Mason to be heard, given that Division III's opinion also included unanticipated positions, distorting the arguments of the trial judge

himself; and that the opinion was handed down with no notice, and with no opportunity to respond to these new and novel legal positions, not in the record.

**3. Federal Due Process Issues Were Raised to the Washington State Supreme Court**: Mr. Mason had suffered a double lack of notice and opportunity to present his case. First, the trial court announced that Mr. Mason had waived all future claims against CBC, (a) even if CBC committed breaches of post-signing promises, and (b) even if CBC committed post-signing torts.

Mr. Mason had no warning, prior to the hearing, that any issues other than those up to the date of the signing of the severance agreement were at issue. 65a.

The trial court presented novel views and relief beyond the scope of the Defendants' motion. Second, the State Court of Appeals surprised Mr. Mason with a new argument in their opinion, without notice, and without facts in the record.

The completely new position articulated by Division III -- that Mr. Mason had not filed any personal claims -- was contrary to the court record; nevertheless, Division III stated that Mr. Mason had never filed torts for post-signing wrongs that he had suffered.

As a matter of logical inference, Division III knew that the trial court's "license to commit future torts" was completely untenable as a matter of law, and so Division III completely ignored what the trial court actually did, and invented entirely new positions, against which Mr. Mason had no opportunity to respond, and certainly had no notice thereof.

At neither the trial court nor the appellate level had Mr. Mason an opportunity to be heard, after proper notice, before suffering a deprivation of nearly $30,000 in charged fees, under a statute that only applies if every aspect of a suit lacks merit. 118a.

This complete lack of notice and opportunity to be heard was presented in Petition for Discretionary Review to the State Supreme Court, which denied the petition, and now this Petition for a Writ of Certiorari to the U.S. Supreme Court represents the last possibility of relief on review.

## REASONS FOR GRANTING THE PETITION

Mr. Mason acknowledges that the U.S. Supreme Court is bombarded with Petitions for Writs of Certiorari, and acknowledges that only one percent or so are accepted. Also, Mr. Mason recognizes that issues such as the recently addressed matter from Washington State, *Doe v. Reed,* 130 S.Ct. 1133 (2010), as to whether or not the signatures on state initiatives should be disclosed to the public, are of obvious great import to the country, and must be heard ahead of cases such as his.

However, it is also important for smaller counties throughout America to be held to the rule of law. And it is important for state courts of appeal to know that they need to carefully review appeals before them to also protect the rule of law, so they appreciate that the lightening bolt of U.S. Supreme Court review can issue from time to time, to prevent the silent and unseen deprivations of due process that so often pass without recognition or remedy in the over-looked rural areas.

Accepting this case for review would send a powerful message that the rule of law can be imposed in cases that are small and insignificant in themselves (though not to the parties), but which buttress the legal edifice as a whole, as an apparatus in which accountability can be imposed, and that the absence of outside review cannot be taken for granted.

Accepting this case establishes that the rule of law matters enough to the highest court in the land, that deprivations of due process against "small" and socially weak participants will not always pass in silence, and with impunity.

The violations of due process are explored in detail, below.

## A. Trial Court Error: Due Process and the Scope of a Motion

Columbia Basin College presented three related issues in its Motion for Summary Judgment which lies at the basis of this appeal:

> IV. STATEMENT OF ISSUES
> 1. Whether Mason has standing to sue for damages where the College allegedly took actions toward three faculty members after his resignation.
> 2. Whether this lawsuit is frivolous and advanced without reasonable cause, entitling the College to an award of attorney fees and costs, pursuant to RCW 4.84.185.
> 3. Whether this lawsuit violates CR 11, requiring the imposition of sanctions.

*Defendants' Motion for Summary Judgment* at 65a.

This is the full scope of CBC's Motion of June 20, 2008.

In the Defendants' "Statement of the Issues" only one substantive cause of action in Mr. Mason's complaint is raised – "Whether Mr. Mason has standing to sue for damages where the College allegedly took actions toward three faculty members after his resignation."

Issues (2) and (3) relate to sanctions, while Issue (1) relates to (a) the oral terms Mr. Mason insisted were part of a total agreement, of which the written document was a partial integration and (b) does not even stretch to the additional oral agreements/ modifications made subsequent to the signing of the agreement, during the period Mr. Mason could have revoked the agreement.

Logically, relief on summary judgment was limited to whether oral terms were included in the initial agreement. Mr. Mason made clear that he relied upon the context rule of Washington State case law at the time he entered into the agreement in late 2003.

Construing the facts in Mr. Mason's favor under CR 56, dismissal was improper.

Nonetheless, even if Mr. Mason's case had been properly dismissed as to the one issue raised by CBC, that would have left for further prosecution (a) Mr. Mason's post-signing contract allegations, and (b) Mr. Mason's post-signing torts, and (c) his fraud and misrepresentation allegations.

The trial court violated basic due process to offer CBC such sweeping relief, beyond the scope of the motion. *Sylvan Beach v. Koch*, 140 F.2d 852 (8th Cir. 1944).

### 1. Fundamental Right to Notice of the Scope of the Motion: *Sylvan Beach*

*Sylvan Beach*, supra, provides an extensive citation to this long-standing fundamental rule of due process:

> In the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity. Galphin v. Page, 85 U.S. 350, 18 Wall. 350, 368, 369, 21 L.Ed. 959; Windsor v. McVeigh, 93 U.S. 274, 277, 278, 23 L.Ed. 914; Coe v. Armour Fertilizer Works, 237 U.S. 413, 423, 35 S.Ct. 625, 59 L.Ed. 1027; Twining v. State of New Jersey, 211 U.S. 78, 110, 111, 29 S.Ct. 14, 53 L.Ed. 97; Ochoa v. Hernandez, 230 U.S. 139, 161, 33 S.Ct. 1033, 57 L.Ed. 1427; Postal Telegraph Cable Co. v. City of Newport, 247 U.S. 464, 476, 38 S.Ct. 566, 62 L.Ed. 1215; Truax v. Corrigan, 257 U.S. 312, 332, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375; Gentry v. United States, 8 Cir., 101 F.51; In re Rosser, 8 Cir., 101 F. 562, 567, 570; In re Noell, 8 Cir., 93 F.2d 5, 6, 7.

*Sylvan Beach v. Koch*, 140 F.2d at 861.

The *Sylvan* court goes on to add:

> A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. Standard Oil Co. v. State of Missouri, 224 U.S. 270, 281, 34 S.Ct. 406, 56 L.Ed. 760, Ann. Cas. 1913D, 936; Barnes v. Chicago, M. & St. P.R. Co., 122 U.S. 1, 14, 7 S.Ct. 1043, 30 L.Ed. 1128; Reynolds v. Stockton, 140 U.S. 254, 265, 266, 11 S.Ct. 773, 35 L.Ed. 464; Clark v. Arizona Mut. Savings & Loan Ass'n, D.C., 217 F. 640, 642-644; Gentry v. United States, 8 Cir., 101 F. 51. Unless all parties in interest are in court and have voluntarily litigated some issue not within the pleadings, the court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded. A party is no more entitled to recover upon *862 a claim not pleaded than he is to recover upon a claim pleaded but not proved.

*Sylvan Beach v. Koch*, 140 F.2d at 861-62.

Obviously, Mr. Mason did not "voluntarily" litigate beyond the scope of the motion. Indeed, at the hearing on June 20, 2008, Mr. Mason had also requested a CR 56(f) continuance, as in the nine months prior to the summary judgment motion, Mr. Mason had been teaching high school English on the Colville Indian Reservation, and all of his spare time had gone to prevent summary judgment against an Asian couple's

lawsuit against J.C. Penny for discrimination, malicious prosecution, and wrongful termination.[2]

*Sylvan* continues to be cited for this basic due process proposition. For example, in the following case, akin to *Mason v. CBC*, the trial court, *sua sponte*, provided its own theory (guarantor liability) to the case, without notice to the disadvantaged party; this decision was then overturned on the same grounds as those on which Mr. Mason seeks relief in this Petition:

> NCC did not claim, either in its complaint or at trial, Hoich was a guarantor of the settlement agreement. The district court held, sua sponte, Hoich was a guarantor. Hoich claims the district court erred by doing so, citing *Armstrong Cork Co. v. Lyons,* 366 F.2d 206, 208 (8th Cir.1966) (quoting *Sylvan Beach v. Koch,*140 F.2d 852, 861 (8th Cir.1944)), which states,
>
> > A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. Unless all parties in interest are in court and have voluntarily litigated some issue not within the pleadings, the court can consider only the issues made by the pleadings, and the judgment may not extend beyond such

---

[2] This case had been suddenly dropped by Mr. Mason's prior Kennewick, WA, employer, Ochoa Law Group, just before summary judgment, and after Mr. Mason had returned to teaching for the 2007-08 academic year.

> issues nor beyond the scope of the relief demanded.
>
> The purpose of this rule is to "assure to every person his day in court before judgment is pronounced against him." *Id.* (quoting *Sylvan Beach,* 140 F.2d at 862). NCC did not plead or pursue this guarantee claim to put Hoich on notice of the allegation as the law requires. Regardless, the facts do not support the district court's finding of guarantor liability.

*Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 791 (8th Cir. 2009).

**2. Application of *Sylvan Beach* to *Mason v. CBC***

The scope of the Defendants' motion, is clear, *supra*. Did Mr. Mason have the terms in his agreement such that he had standing to sue for the three faculty who were subsequently mistreated? In sum: Did the initial contract have oral terms?

That was the full scope of the CBC's motion.

Yet the trial court stated, on June 20, 2008 (emphasis added):

> THE COURT: Thank you. Okay. Let me just briefly go back over the termination of tenured employment relationship agreement executed between the parties. And I believe the president of the college signed it on October 22 of '03 and the plaintiff signed it and was notarized on October 24 of '03. You promised you would never sue him again; you did. It's in writing.

> You promised never to sue him again. The very last page, exactly two inches above your signature line, is in nice, big, bold print: This is a final release of all claims. Forget about the entirety agreement for half a second. You promised not to sue him. It was a final release of all claims.

24a.

The trial court here creates the license for CBC to commit future torts against Mr. Mason. Further, the trial court dismissed all concerns about whether or not the agreement was violated by CBC, as the trial court stated that the agreement not to sue included an agreement not to sue over breaches of the terms of the contract. *See* "Forget about the entirety agreement..." at 24a.

Logically, one can only "[f]orget about the entirety of the agreement" if CBC had the right to violate the contract, not just to commit future torts, while Mr. Mason remained bound by the covenant not to sue!

The theory of the trial court, was its own invention, *sua sponte*, just as was the theory criticized in *American Prairie, supra.*

The trial court, in *Mason v. CBC*, developed its own theory, far beyond the scope of the Defendants' motion, and under this *sua sponte*, novel, and unforeseen theory of the trial court, Mr. Mason lost all rights to any claim against CBC, for wrongs past or future, which rendered Mr. Mason's suit "frivolous" under Wash. Rev. Code § 4.84.185, and subjected Mr. Mason to the sanction of attorneys fees. 28a.

## B. Washington State Court of Appeals and Violations of Due Process

### 1. Brief Review of Due Process Guarantees Under the 14th Amendment

In *Ogle v. Salmataof Native Ass'n, Inc.*, the Alaska District court summarized the application of due process, through the 14th Amendment, to the states:

> The phrase "due process of law," which also occurs in the Fourteenth Amendment to the Constitution as a limitation on actions by the states, encompasses two general ideas: the protection of substantive rights (substantive due process) and the protection of procedural fairness (procedural due process). *See Zinermon v. Burch*, 494 U.S. 113, 125-28, 110 S.Ct. 975, 983-85, 108 L.Ed.2d 100 (1990).[FN4]

*Ogle v. Salamatof Native Ass'n, Inc.*, 906 F. Supp. 1321, 1326 (D. Alaska 1995).

The present case is unique in that the due process violations were distinct at each court level. At the trial court level, the trial court invented a theory, *sua sponte*, in a manner precisely like that reversed in *American Prairie Const. Co. v. Hoich*, 560 F.3d 780, 791 (8th Cir. 2009), *supra*. Then at the state appellate level, Mr. Mason was confronted with another unique theory: namely, that he had not brought any tort or fraud actions against CBC, only an ordinary contract action, despite the fact that this view was clearly contrary to his Complaint. 30a, 72a, 144a, 197a, 221a, and 252a.

Mr. Mason's liberty interest in bringing his suit, and property interest in avoiding substantial sanctions, were violated by these fundamental breaches of procedural due process, which worked to substantively deprive Mr. Mason of the protections of the law.

## 2. Division III of the Washington Court of Appeals Limiting Mr. Mason's Issues without Due Process of Law

In the Division III unpublished opinion, the Washington Court of Appeals offered the following summary of the case:

> Craig Mason entered into an agreement by which he gave up his tenured position at Columbia Basin College (CBC) in exchange for $140,000. He later sued CBC... claiming that it had breached the separation contract by taking disciplinary actions against other teachers at the school. Finding no such provision in the contract, the trial court dismissed the action. We agree that the fully integrated contract did not address other teachers and that Mr. Mason cannot bring suit for breach of the alleged term. We affirm.

2a.

Division III proceeds to restate the nature of the case, without Mr. Mason's other causes of action, as reduced to:

> The primary question is whether Mr. Mason has standing to complain about the school's actions against other teachers.

4a.

Division III then ratified the trial court's dramatic rescission of Mr. Mason's actual causes of action down to the trial court's narrow, *sua sponte*, theory on which it could reject Mr. Mason's appeal by construing the facts against Mr. Mason.

> Here, the trial court explained that it was granting sanctions because the action was without foundation in law or fact, and "because you promised not to sue them and it was a final release of all claims, I am granting sanctions and terms." CP 644. These were tenable grounds for sanctioning Mr. Mason for frivolous litigation. He had signed a release of claims and promised not to sue, and then did so.

9a.

In its own backdoor manner, Division III also turned "[He]...promised not to sue" into waiver of future torts – a license for CBC to commit future wrongs against Mr. Mason with impunity.

The Washington Court of Appeals actively ignored the post-signing legal issues, and ignored Mr. Mason's personal torts, including the defamation claim about which Matt Mathesius had filed a Declaration in the trial court creating a genuine issue of material fact (emphasis added):

> Mr. Mason contends that interpreting the contract in this manner authorizes CBC to commit torts. That is incorrect. The tort victim still has the opportunity to proceed against the tortfeasor. It is simply Mr. Mason who has no basis to sue CBC (or anyone else) for tortious actions it committed against someone else. Only the third-party beneficiary of a contract can sue for the harm done to another. *Burke & Thomas, Inc. v. Int'l. Org. of Masters, Mates & Pilots*, 92 Wn.2d 762, 767-768, 600 P.2d 1282 (1979). Mr. Mason was not a named beneficiary of any contract that CBC had with the other teachers; likewise, they were not beneficiaries of Mr. Mason's separation agreement with CBC. In neither circumstance could Mr. Mason sue for actions taken by CBC against those teachers. The trial court correctly determined that the contract did not convey standing to sue for alleged wrongs done to third persons. Summary judgment was properly granted.

7a.

As noted, above, Mr. Mason's complaint had raised personal torts, including defamation and intentional infliction of emotional distress, and not only raised questions about the oral terms of the Full Agreement. See Complaint at 30a.

Both courts' theories were *post hoc*, *sua sponte*, and Mr. Mason could not have imagined the need to defend against these views until after the courts spoke. Both the trial court and the state court of appeals engaged in *Sylvan Beach*, *supra*, violations of due process.

### 3. Issues Actually Raised by Mr. Mason on Appeal

The following issues were raised by Mr. Mason on appeal (emphasis added):

***B. Issues Pertaining to Assignments of Error***

*1. Did the trial court apply the proper summary judgment standard, which requires the court to construe the facts against the moving party, when the court construed facts in favor of the moving party? (Assignment of Error 1.)*

*2. Should the trial court have applied the "Context Rule" of contract interpretation, which requires that all factors surrounding the agreement be considered, and which requires that such contextual facts be determined by the jury? (Assignment of Error 1.)*

*3. Should the trial court have ignored the postsigning period of revocation of the agreement at issue, a 10 day period during which the Plaintiff offered fresh consideration for additional Defendant promises in guarantee of the contract at issue? (Assignment of Error 1.)*

*4. Should the trial court have construed the boilerplate language of the contract at factual issue to not only recompense past wrongs in settlement, but to license Defendants to commit future wrongs against the Plaintiff, and should the trial court have construed the agreement to waive all of Plaintiff's future legal actions against all future wrongs committed by the*

*Defendants against the Plaintiff? (Assignment of Error 1.)*

*5. Should the trial court, having interpreted the waiver provisions of the agreement at issue to waive all future legal action, have dismissed all non-contract causes of action? (Assignment of Error 1.)*

*[.6 & .7 related to CR 56(f)]*

*8. Did the trial court fail to apply the proper legal standard in granting Defendants' request for sanctions under RCW 4.84.185? (Assignment of Error 3.)*

*9. Did the trial court fail to properly find specific Facts to support a finding under RCW 4.84.185 that Mr. Mason's claims were entirely without rational basis in law or fact? (Assignment of Error 3.)*

*10. Did the trial court err on June 20, 2008 in granting, in part, Defendants' motion to strike portions of Plaintiff's affidavits, as the stricken material was only offered to prove the actions directly witnessed by the declarants? (Assignment of Error 4.)*

*Appellant's Brief*, at 82a-83a.

Division III deprived Mr. Mason of due process: (a) by failing to note that his complaint had causes of action beyond those regarding protection for 3rd parties, including personal torts, and (b) by failing to address that an entire suit must be frivolous to

support a sanction under Wash. Rev. Code § 4.84.185, and by failing to acknowledge Mr. Mason's torts, the sanction under Wash. Rev. Code § 4.84.185 was improperly found against Mr. Mason.

The trial court had granted CBC a license to commit future torts against Mr. Mason. Division III re-cast Mason's Complaint to only relate to third parties, and by Division III re-casting the trial court, it could avoid directly addressing the issue of the trial court's creation of a waiver for CBC to commit future wrongs against Mr. Mason with impunity.

### C. The Two-Step Dance of Due Process Violation: Trial Court Granted a License, and the Court of Appeals Narrowed the Complaint.

In sum, the trial court dispatched all of Mr. Mason's personal claims by turning the partially integrated agreement into a fully integrated license for CBC to commit future wrongs against Mr. Mason. Then, knowing it could not uphold the "tort license," the Washington Court of Appeals ignored all of Mr. Mason's Complaint, except for the issue on which reasonable minds could differ – third party terms. (Had the facts been construed in favor of Mr. Mason, even this issue could not have been dismissed).

This two-step process completely denied Mr. Mason of notice of the arguments and claims to be made, and left him with no opportunity to be heard, or to substantively respond.

Given that the Washington State Supreme Court denied discretionary review, Mr. Mason now Petitions

the U.S. Supreme Court to remedy this two-step violation of fundamental due process.

### D. Petitioner's Reply Brief to the State Court of Appeals: Lack of Opportunity to Be Heard and Lack of Due Process -- Un-rebutted and Substantial Arguments of the Petitioner Were Ignored.

A review of Mr. Mason's Division III Reply Brief, 144a-188a, clearly shows that significant issues raised by Mr. Mason were not addressed by Division III in its opinion, and that Division III confined its review and opinion only to issues raised by CBC. Thus, at the trial court, CBC's relief went beyond its motion, and then at Division III, Mr. Mason's issues were not reviewed as the court narrowed its scope of review to only those issues raised by CBC, and as cast by CBC. This violated basic fairness and due process.

For example, it was un-rebutted on appeal the sole factual finding made in the court below was that one finding which licensed CBC to commit future torts against Mr. Mason with impunity. 28a. This is the sole basis for the sanctions against Mr. Mason as well.

It was un-rebutted that the Defendants had advanced the wrong standard of review on summary judgment. 157a-159a.

It was un-rebutted that the trial court had construed questions of fact against Mr. Mason, contrary to CR 56. 158a-187a.

While Mr. Mason had no due process right to win on his issues, Mr. Mason had a right to fundamental

procedural fairness and due process before Mr. Mason would suffer deprivations of liberty interests and property interests. Instead, Mr. Mason suffered these losses without any notice, and without any legal consideration of his positions.

Substantively, the lower court decisions were in error, and the processes by which they arrive at their errors of silence, and of surprise invention, were done in violation of the principles of *Sylvan Beach*.

Stated differently, Mr. Mason had no notice of the license-to-commit-future-wrongs theory of the trial court, until the trial court invented it, *sua sponte*, after the oral arguments of June 20, 2008.[3]

Next, Mr. Mason had no way to know that he would not get a fair hearing at the state court of appeals, and that the basis for denying relief would violate fundamental fairness.[4]

---

[3] Essence of due process is requirement that person in jeopardy of serious loss be given notice of case against him and opportunity to meet it. *Kaczmarczyk v. I.N.S.*, 933 F.2d 588 (7th Cir.), *cert. denied*, 502 U.S. 981 (1991).

[4] In general, due process requires that individual be given notice and opportunity to be heard before being deprived of property interest. *Amstar Corp. v. M/V Alexandros T.*, 431 F. Supp. 328 (D.C. Md. 1977), *aff'd*, 664 F.2d 904 (4th Cir. 1981). *See also*, *Connell v. Shoemaker*, 555 F.2d 483 (5th Cir. 1977); *Wise v. Herzog*, 114 F.2d 486 (D.C. Cir. 1940); *Standard Oil Co. v. F.T.C.*, 475 F. Supp. 1261 (D. Ind. 1979); *Onweiler v. United States*, 432 F. Supp. 1226 (D. Idaho 1977); *United States v. White*, 429 F. Supp. 1245 (D. Miss. 1977); *Techem Chem. Co., Ltd. v. M/T Choyo Maru*, 416 F. Supp. 960 (D. Md. 1976); *United States v. San Juan Lumber Co.*, 313 F. Supp. 703 (D. Colo. 1969).

## E. Additional Violations of Due Process

Mr. Mason had no realistic opportunity to be properly heard under CR 56, in that the facts were construed in favor of the moving party.

Mr. Mason's CR 56(f) motion was improperly denied when Mr. Mason filed his suit in May of 2007, and began teaching on the Colville Reservation in August, 2007, and when CBC's counsel stipulated to a new trial in the fall of 2008, and where Mr. Mason intended to use the summer of 2008 (up to the discovery cut-off at the end of July 2008) to produce his evidence for trial, and to survive summary judgment.

Washington's court rules are similar to the Federal court rules, and Washington interprets CR 56(f) using Federal precedent. For example, the *Turner v. Kohler* court wrote:

> There are relatively few Washington cases addressing CR 56(f). However, it is essentially the same as Fed.R.Civ.P.*694 56(f).[FN4] Therefore, we look to decisions and analysis of federal rules for guidance in interpreting the state rule. *Rinke v. Johns-Manville Corp.*, 47 Wash.App. 222, 225, 734 P.2d 533, *review denied*, 108 Wash.2d 1026 (1987).

*Turner v. Kohler*, 775 P.2d 474, 476-77 (1989).

When it was fully in the record that Mr. Mason, from August 2007 to mid-June 2008, commuted nearly 4 hours a day, and worked on *Song v. J.C. Penny*, Case No. 01-2-01283-2, evenings and weekends until late spring, 2008, it was a manifest abuse of discretion and

a violation of due process not to allow Mr. Mason more time, under CR 56(f), to respond to CBC's Motion for Summary Judgment.

Such one-sided deprivations of an opportunity to advance one's claims, and such one-sided imposition of sanctions on grounds violative of *Sylvan Beach* principles, merit summary reversal of summary judgment, and remand to the trial court with instructions to allow Mr. Mason to proceed with his suit against CBC with a new case scheduling order that allows for generous discovery time.[5]

## F. Additional Public Policy Reasons Why the Court Should Accept this Case on Petition for Writ of Certiorari

Perhaps the following argument is a piffle to any but an inveterate civic moralist. If it has no weight, Mr. Mason asks the court to ignore the following, and to grant the petition (or summary remand) based upon that which has gone before.

Mr. Mason has taught college for 19 of the past 28 years, mostly fulltime, and in five universities and in one community college (CBC). His teaching in sociology, marriage and the family, history, classical

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[5] To meet the standards of basic due process, a hearing required must be a fair one, that is, one before a tribunal which meets at least currently prevailing standards of impartiality. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). *See also, Wong Yang Sung v. McGrath*, 339 U.S. 33, *modified on other grounds*, 339 U.S. 908 (1950); *Fed. Trade Comm'n v. Scientific Living, Inc.*, 150 F. Supp. 495 (D. Pa. 1957), *aff'd* 254 F.2d 598 (3d Cir. 1958), *cert. denied*, 358 U.S. 867 (1958), *reh'g denied*, 353 U.S. 938 (1959).

political thought, modern political thought, and the social sciences, implicitly involve teaching about the law. Teaching American government, criminal law, and jurisprudence have required his teaching about the law explicitly, and in particular detail.

Judicial notice can be taken of the Critical Legal Studies movement, which expanded vastly as an academic movement in the 1990's, and which remains potent. Many scholars preach that the rule of law is a myth.

In his teaching, Mr. Mason has presented the views of the Critical Legal Studies movement as an academic exercise, but from his own experience of defending CBC faculty against unjust charges for twelve continuously successful years, Mr. Mason could present to students a strong faith in the rule of law as a reality, as well as an ideal.

However, in this present case, Mr. Mason has experienced the rhetorical processes of "marginalizing" Mr. Mason and his views, and of the lower courts systematic "silencing" Mr. Mason, all working to confirm the nihilistic reality predicted by Critical Legal Theory. The fundamental injustices which this Petition of Writ for Certiorari ask the U.S. Supreme Court to address, have a public policy value for the court to set aright.

Mr. Mason, while in graduate school, was given his own sociology courses to teach even before he earned his Master's at the University of Washington. When Mr. Mason taught at Eastern Washington University in 1996-97, he was offered immediate tenure as an associate professor to stay at EWU. Currently, Mr.

Mason is teaching at least half-time at Gonzaga University, and is forced to again gauge the truth of the nihilism of the Critical Legal Studies movement about the possibilities of the rule of law.

Although there are inevitably unanswered injustices in life, in this case, the lower courts themselves are active agents in the wrongs.

As Anthony D'Amato has written (emphasis added):

> The Symposium of which this essay is a part is entitled "Deconstruction and the Possibility of Justice." If we take the most elementary interpretation of the last term, "justice"-at a level even more basic than that explored by Jacques Derrida when he patiently deconstructed the title of this Symposium-we must acknowledge that justice, in any situation, depends upon a full and fair accounting of the *facts* of that situation. If, instead of facts, *fictions* are introduced that are *contrary* to the facts, then any claimed "just solution" based on such fictions cannot [FN1] achieve justice in the real world. [FN2] The proposition is so elementary that it usually goes without saying. (text of footnotes omitted)

Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 Cardozo L. Rev. 1313, 1318 (1990).

So, too, in *Mason v. CBC*, the trial court's decision that Mr. Mason gave CBC a complete license to commit future torts -- when such a license was never contemplated by the parties to the agreement, nor

suggested by any party prior to the trial court's *sua sponte* invention of this theory – is elementarily wrong.

The injustice of this "proposition is so elementary that it...goes without saying" that it should be reversed.

The state court of appeals then proceeded to develop a different version of clearly erroneous facts in its surprise decision, which it refused to reconsider, and which the Washington State Supreme Court did not take upon discretionary review.

In short, by accepting review, the U.S. Supreme Court can send a message to socially-weak parties, in the small counties of this country, that, at times, the highest court in the land can offer its power of review to remedy the injustices they have suffered for being small, remote, and easily shunted aside with merely the appearance of due process, that, in substance, is worse than no process at all.[6]

As Anthony D'Amato wrote further in that same article (emphasis added):

> Do judges routinely display a casual attitude toward the facts of the case? I suggest that practicing attorneys be asked whether they have had cases where the judge's statement of

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[6] Indeed, if Mr. Mason had notice of how his case would advance without the norms of legality being followed, he could have avoided filing suit to defend himself, his reputation, and his former colleagues, and thus could have avoided a large financial sanction, unjustly added to the injustices which precipitated his suit.

> the facts were false. Every practicing attorney to whom I have asked this question has responded in the affirmative; some have told me that the practice is, unfortunately, quite common, and that judicial misrepresentation of the facts of cases has produced a crisis in their professional lives. They feel that their work is subject to the whim of judges who play God with the facts of a case, changing them to make the case come out the way the judge desires. Some say that if they had known that the practice of law would be like this, they would have gone into a different profession. Professor Monroe Freedman recently stated in a speech to the Federal Circuit Judicial Conference:
>
> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules. [FN95] Professor Freedman wrote a letter to me in which he stated that at the ***1346** luncheon immediately following his speech, a judge sitting next to him said (*apropos* of the passage above quoted), "You don't know the half of it!" [FN96] (footnote text omitted)

11 Cardozo L. Rev. at 1345-46.

This case should be accepted for review so that the U.S. Supreme Court can play its role in defending the

ideals and practices of the rule of law in these United States of America, and right a fundamental wrong.

## CONCLUSION: PETITION ON WRIT FOR CERTIORARI SHOULD BE ACCEPTED

For the foregoing reasons, this Petition on Write for Certiorari should be accepted.

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*Petitioner Pro Se*

# APPENDIX

# APPENDIX

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## APPENDIX A

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

**No. 27322-9-III**
**Division Three**

**[Filed May 14, 2009]**

| | |
|---|---|
| CRAIG MASON, | ) |
| | ) |
| Appellant, | ) |
| | ) |
| vs. | ) |
| | ) |
| COLUMBIA BASIN COLLEGE, COLUMBIA BASIN BOARD OF TRUSTEES, LEE THORNTON, RICH CUMMINS, MEG WOODS, AND THE MARITAL COMMUNITY OF MEG WOODS AND RICH CUMMINS, DAVID SHAW AND THE MARITAL COMMUNITY OF DAVID SHAW AND JANE DOE SHAW, DEBORAH MEADOWS AND THE MARITAL COMMUNITY OF DEBORAH MEADOWS AND MIKE GRINNELL, RUBEN LEMOS AND THE MARITAL COMMUNITY OF RUBEN LEMOS AND JANE DOE LEMOS, AND BILL MCKAY AND THE MARITAL COMMUNITY OF BILL MCKAY AND JANE DOE MCKAY, | ) |
| | ) |

Respondents. )
)

## UNPUBLISHED OPINION

KORSMO, J. – Craig Mason entered into an agreement by which he gave up his tenured position at Columbia Basin College (CBC) in exchange for $140,000. He later sued CBC for $4,000,000, claiming that it had breached the separation contract by taking disciplinary actions against other teachers at the school. Finding no such provision in the contract, the trial court dismissed the action. We agree that the fully integrated contract did not address other teachers and that Mr. Mason cannot bring suit for breach of the alleged term. We affirm.

### FACTS

Mr. Mason was employed by Columbia Basin College between 1988 and 2003 as a tenured professor and also served in various administrative positions. He also was a faculty union leader. Following what he perceived as "ethical issues" and tortious misconduct by college administrators, Mr. Mason decided to leave the school and negotiated his resignation.[1] On October 24, 2003, he signed an agreement giving up his tenure and terminating his employment in exchange for $140,000.

The separation agreement expressly stated that Mr. Mason released any legal claims he may have had

[1] Mr. Mason obtained a law degree during his tenure at the college.

against CBC. The contract also contained two integration clauses stating that the agreement constituted the entirety of the understanding of the parties and that the document superseded any earlier discussions or oral agreements of any kind. It also required that any modification of the contract had to be agreed upon in writing by both parties. Clerk's Papers (CP) 538-539, 541.

Nearly four years later, on May 3, 2007, Mr. Mason *pro se* filed a lawsuit against CBC, alleging he was entitled to $4,000,000 in damages due to breach of contract, intentional infliction of distress, negligent misrepresentation, and fraud relating to the contract. The allegations arose after CBC allegedly took disciplinary or adverse employment action against three faculty members who were former colleagues of Mr. Mason.

CBC sent Mr. Mason a mitigation letter stating the claims were frivolous and allowing him to dismiss the suit. He did not. CBC, on March 24, 2008, moved for summary judgment and requested attorney fees and costs under RCW 4.84.185 and sanctions under CR 11. Mr. Mason filed a response to the motion and also moved for a continuance to conduct discovery, arguing that he had been too busy teaching and preparing for another trial to prepare for trial in this case. CBC in turn moved to strike portions of the response.

The trial court struck exhibit B to the response and denied the motion for a continuance. The court also granted summary judgment, reasoning that the separation agreement released all claims Mr. Mason might have. The court also found the litigation frivolous under RCW 4.84.185 and imposed costs and

attorney fees under that statute. The court declined to grant sanctions under CR 11. Mr. Mason then appealed to this court.

## ANALYSIS

The primary question is whether Mr. Mason has standing to complain about the school's actions against other teachers. There is no provision in the separation agreement that concerns those teachers and Mr. Mason's effort to add such a term fails. He also lacks standing as a third party to bring an action concerning those matters. The trial court thus properly granted summary judgment. The court also did not abuse its discretion in denying the requested continuance and did not err in striking the unauthenticated document.

This court reviews a summary judgment *de novo*, performing the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.*

The moving party bears the initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish there is a genuine issue for the trier of fact. *Id.* at 225-226. The plaintiff may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v.*

*MGM/UA Entm't. Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.*

*Separation Agreement.* Mr. Mason contends that the school agreed to protect the other teachers as part of its agreement with him. The separation contract contains no provisions that mention the other teachers. In his deposition, Mr. Mason states that he discussed the issue with CBC President Thornton prior to signing the agreement. CP 487. He also testified in the deposition, and argues in his briefing, that the agreement occurred after the separation contract was signed in exchange for a promise not to revoke the settlement agreement. CP 487-490; Br. of Appellant at 14, 36. He argues that the court should consider extrinsic evidence on this topic under the "context rule" of *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). *Berg* and its progeny do not help Mr. Mason's argument.

*Berg* involved a 99-year ground lease with varying rental rates and varying possible interpretations of those rates. The court took advantage of the opportunity to explain when extrinsic evidence could be considered in relation to contracts. *Id.* at 667. Extrinsic evidence is always available as an interpretive aide to establish what the parties intended. *Id.* It is not limited to situations where contract language is ambiguous. *Id.* at 669. The court distinguished the issue of contract *interpretation* from that of contract *integration*. *Id.* at 670. In the latter circumstance, the question is whether the contract is a complete statement of the entirety of the parties' agreement (*i.e.*, integrated), or if it is only a statement of part of the parties' agreement (*i.e.*, partially

integrated). *Id.* With respect to matters of integration, the parol evidence rule still applies.

> [P]arol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake.

*Id.* (quoting *St. Yves v. Mid State Bank,* 111 Wn.2d 374, 377, 757 P.2d 1384 (1988) (internal quotation marks omitted)).

*Berg* thus adhered to the parol evidence rule in cases of completely integrated contracts. 115 Wn.2d at 670. With respect to partially integrated agreements, extrinsic evidence is permitted to prove additional terms as long as those terms are not inconsistent with the written terms. *Id.*

Mr. Mason's invocation of *Berg's* "context rule" suggests that he is asking us to interpret the separation agreement. *Id.* at 667-669. However, there is nothing in the agreement that we can possibly interpret to include protection of the three named teachers as a condition of the separation agreement. Indeed, Mr. Mason does not point to any provision and claim that it means other teachers were protected. The true question, then, is one of integration because Mr. Mason is actually arguing that there is an additional term that is not included in the separation agreement.

Mr. Mason repeatedly states that the contract is partially integrated, but he produces no evidence in support of that position except his own vague

statements. More is required. *Seven Gables,* 106 Wn.2d at 13. On its face, this contract is totally integrated, and twice states that fact. Thus, the parol evidence rule prohibits introduction here of evidence that would add a term to a complete contract. *Berg,* 115 Wn.2d at 670.

Mr. Mason contends that interpreting the contract in this manner authorizes CBC to commit torts. That is incorrect. The tort victim still has the opportunity to proceed against the tortfeasor. It is simply Mr. Mason who has no basis to sue CBC (or anyone else) for tortious actions it committed against someone else. Only the third-party beneficiary of a contract can sue for the harm done to another. *Burke & Thomas, Inc. v. Int'l. Org. of Masters, Mates & Pilots,* 92 Wn.2d 762, 767-768, 600 P.2d 1282 (1979). Mr. Mason was not a named beneficiary of any contract that CBC had with the other teachers; likewise, they were not beneficiaries of Mr. Mason's separation agreement with CBC. In neither circumstance could Mr. Mason sue for actions taken by CBC against those teachers.

The trial court correctly determined that the contract did not convey standing to sue for alleged wrongs done to third persons. Summary judgment was properly granted.

*Continuance.* Mr. Mason also claims the trial court erred in failing to grant him a continuance to conduct discovery. A trial court has broad discretion to grant or deny a continuance; the court's decision will only be overturned for manifest abuse of discretion. *Coggle v. Snow,* 56 Wn. App. 499, 504, 784 P.2d 554 (1990). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll*

*v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court may deny a CR 56(f) motion for a continuance when "(1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy,* 116 Wn. App. 291, 299, 65 P.3d 671, *review denied,* 150 Wn.2d 1017 (2003).

This lawsuit was filed May 3, 2007. The trial court set a discovery deadline of January 11, 2008. Mr. Mason obtained an extension of that deadline until July 30, 2008. He undertook no discovery during that time period. He sought to extend the deadline once more when CBC filed its motion for summary judgment. The trial judge concluded that no good reason had been shown for further delay and there was no statement of what evidence would be obtained or how it would create a genuine issue of material fact. CP 601-602. The trial court considered the proper standard and found Mr. Mason's motion lacking. It certainly had a tenable basis for denying the continuance.

The court did not abuse its discretion in denying a further extension for discovery.

*Striking Exhibit B.* Mr. Mason also argues that the trial court erred when it struck exhibit B to his declaration in opposition to the motion for summary judgment. The court struck the exhibit, on motion of CBC, because it was not an affidavit and did not meet the requirements for a declaration. CP 603-604.

CR 56(e) has express requirements for evidence considered at summary judgment. The information must be admissible in evidence and based on personal knowledge. "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." *Id.* The challenged exhibit did not meet those requirements. It was a copy of a letter Mr. Mason received from another CBC teacher. He argues that the letter was not hearsay because it was offered to show what Mr. Mason knew. While that may be true, it is beside the point. The question is whether the document was properly authenticated. It was not.

The trial court did not err in striking exhibit B. CR 56(e).

*Frivolous Litigation.* The trial court found the lawsuit was frivolous under RCW 4.84.185 and imposed costs and attorney fees. A trial court has discretion under RCW 4.84.185 both to impose sanctions for frivolous litigation and to determine the amount of reasonable attorney fees. *Fluke Capital & Mgmt. Servs. Co. v. Richmond,* 106 Wn.2d 614, 625, 724 P.2d 356 (1986); *Zink v. City of Mesa,* 137 Wn. App. 271, 277, 152 P.3d 1044 (2007), *review denied,* 162 Wn.2d 1014 (2008).

Here, the trial court explained that it was granting sanctions because the action was without foundation in law or fact, and "because you promised not to sue them and it was a final release of all claims, I am granting sanctions and terms." CP 644. These were tenable grounds for sanctioning Mr. Mason for frivolous litigation. He had signed a release of claims and promised not to sue, and then did so. He also did

not make efforts to advance the litigation or attempt to prove his claims.

The trial court did not abuse its discretion in finding the action frivolous.

*Sanctions on Appeal.* CBC asks this court to impose further sanction against Mr. Mason for appealing this frivolous action. We decline to do so. While the entire appeal was without merit, it was not entirely frivolous. As prevailing party, CBC is entitled to its costs on appeal. RAP 14.2.

The judgment of the trial court is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

/s/Korsmo, J.
Korsmo, J.

WE CONCUR:

/s/Sweeney, J.
Sweeney, J.

/s/Brown, J.
Brown, J.

## APPENDIX B

**STATE OF WASHINGTON**
**FRANKLIN COUNTY SUPERIOR COURT**

**NO. 07-2-50411-0**

**[Filed June 20, 2008]**

| | |
|---|---|
| CRAIG MASON, | ) |
| Plaintiff, | ) |
| vs. | ) |
| | ) |
| COLUMBIA BASIN COLLEGE, COLUMBIA BASIN BOARD OF TRUSTEES, LEE THORNTON, RICH CUMMINS, MEG WOODS, AND THE MARITAL COMMUNITY OF MEG WOODS AND RICH CUMMINS, DAVID SHAW AND THE MARITAL COMMUNITY OF DAVID SHAW AND JANE DOE SHAW, DEBORAH MEADOWS AND THE MARITAL COMMUNITY OF DEBORAH MEADOWS AND MIKE GRINNELL, RUBEN LEMOS AND THE MARITAL COMMUNITY OF RUBEN LEMOS AND JANE DOE LEMOS, AND BILL MCKAY AND THE MARITAL COMMUNITY OF BILL MCKAY AND JANE DOE MCKAY, | ) |
| Defendants. | ) |
| | ) |

## ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter came before the court on the defendants' Motion for Summary Judgment. The court reviewed the defendants' Motion and Memorandum in Support of Summary Judgment, including the declarations of Deborah Meadows, David Arnold, Brian Agar, and Paul Triesch, and the exhibits and attachments thereto, the plaintiff's Response, including the admissible portions of the declarations of Craig Mason, Matt Mathesius, and Lori Mason, and the admissible documents appended thereto, and the defendants' Reply, including the Supplemental Declaration of Paul J. Triesch, and the exhibits appended thereto. The court also heard argument of the parties through defense counsel and the plaintiff *pro se*.

Wherefore, being fully informed, the court finds that the plaintiff's claims against the defendants lack factual and legal support. They must be dismissed.

The court further finds that the plaintiff's claims were frivolous and advanced without a reasonable basis in law or fact and were interposed for improper purposes. The defendants are entitled to an award of attorney fees and costs, pursuant to RCW 4.84.185.

AG

~~The Court further finds that the plaintiff lacked any legal or factual basis for his claims prior to commencing this lawsuit and that he signed the Summons and Complaint in bad faith and in violation of CR-11, Rules for Superior Court.~~

PJT

Therefore, IT IS HEREBY ORDERED that the defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED. The plaintiff's claims against the defendants are and shall be dismissed in their entirety, with prejudice.

IT IS ALSO HEREBY ORDERED that the plaintiff shall reimburse the defendants' their reasonable costs and attorney fees, pursuant to RCW 4.84.185, upon proof of the same by the defendants and after hearing before this court, if necessary.

~~IT IS ALSO HEREBY ORDERED that the plaintiff shall pay sanctions to the court in the amount of $2,500.00 for violation of CR 11 Rules for Superior Court.~~ (AC)

DONE IN OPEN COURT this 20th day of JUNE, 2008.

/s/William D. Acey
JUDGE

PRESENTED BY:

ROBERT M. MCKENNA
Attorney General

/s/PAUL J. TRIESCH
PAUL J. TRIESCH, WSBA #17445
Assistant Attorney General
Attorney For Defendants

Agree As To Form,
Notice Of Presentation Waived:

/s/CRAIG MASON
CRAIG MASON, WSBA #32962
Plaintiff *Pro Se*

## APPENDIX C

## THE SUPREME COURT OF WASHINGTON

**NO. 83463-6**
**C/A NO. 27322-9-III**

**[Filed January 5, 2010]**

| | |
|---|---|
| CRAIG MASON, | ) |
| | ) |
| Petitioner, | ) |
| | ) |
| v. | ) |
| | ) |
| COLUMBIA BASIN COLLEGE, COLUMBIA BASIN BOARD OF TRUSTEES, LEE THORNTON, RICH CUMMINS, MEG WOODS, and the marital community of MEG WOODS and RICH CUMMINS, DAVID SHAW and the marital community of DAVID SHAW AND JANE DOE SHAW, DEBORAH MEADOWS and the marital community of DEBORAH MEADOWS and MIKE GRINNELL, RUBEN LEMOS and the marital community of RUBEN LEMOS and JANE DOE LEMOS, AND BILL MCKAY and the marital community of BILL MCKAY and JANE DOE MCKAY, | ) |
| | ) |
| Respondents. | ) |

## ORDER

Department I of the Court, composed of Chief Justice Alexander and Justices C. Johnson, Sanders, Owens and J. Johnson, considered at its January 5, 2010, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 5th day of January, 2010.

For the Court

/s/
CHIEF JUSTICE

## APPENDIX D

## COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON

**No. 27322-9-III**

**[Filed July 16, 2009]**

CRAIG MASON,

Appellant,

vs.

COLUMBIA BASIN COLLEGE, COLUMBIA BASIN BOARD OF TRUSTEES, LEE THORNTON, RICH CUMMINS, MEG WOODS, AND THE MARITAL COMMUNITY OF MEG WOODS AND RICH CUMMINS, DAVID SHAW AND THE MARITAL COMMUNITY OF DAVID SHAW AND JANE DOE SHAW, DEBORAH MEADOWS AND THE MARITAL COMMUNITY OF DEBORAH MEADOWS AND MIKE GRINNELL, RUBEN LEMOS AND THE MARITAL COMMUNITY OF RUBEN LEMOS AND JANE DOE LEMOS, AND BILL MCKAY AND THE MARITAL COMMUNITY OF BILL MCKAY AND JANE DOE MCKAY,

Respondents.

## ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 14, 2009 is hereby denied.

DATED: July 16, 2009

FOR THE COURT: /s/John A. Schultheis
JOHN A. SCHULTHEIS
CHIEF JUDGE

## APPENDIX E

**[Filed August 6, 2008]**

**Franklin County Clerk**
and Ex-Officio Clerk of Superior Court

**Michael J. Killian**
*County Clerk*
*email.mkillian@co.franklin.wa.us*

1016 North 4th
Pasco, WA 99301
509.545.3525
509.545.2243
www.co.franklin.wa.us

Date: August 4, 2008

To: Judge Acey

From: Superior Court Clerk

Re: Franklin County Cause No. 07-2-50411-0

Case Title: Craig Mason vs
Columbia Basin Coilege et al

Attached is:

XX MOTION FOR RECONSIDERATION [AS TO DENIAL OF ADDITIONAL TIME TO RESIST MOT. FOR SUMMARY JDGMNT.]

___Granted ✗ Denied ___Bench Copy Not Provided

___ Motion for Review of Commissioner's Decision

___Reversed ___Affirmed ___Modified

Comments: THE DEFENDANTS' PENDING MOTION OR PRESENTMENT IS STILL ON FOR FRIDAY 12/12/08 @ 10AM LOCATION TO BE SET BY COURT ADMINISTRATION.

PLEASE CHECK THE APPROPRIATE BOX AND/OR ADVISE IN COMMENT AREA

DATED THIS 5th DAY OF August, 2002

/s/William D. Acey
William D. Acey
Judge/~~Court Commissioner~~

cc: PARTIES/ATTORNEYS
COURT ADMIN.

## APPENDIX F

**[Filed July 15, 2008]**

**Franklin County Clerk**
and Ex-Officio Clerk of Superior Court

**Michael J. Killian**
*County Clerk*
*email.mkillian@co.franklin.wa.us*

1016 North 4th
Pasco, WA 99301
509.545.3525
509.545.2243
www.co.franklin.wa.us

Date: July 7, 2008

To: Judge Acey

From: Superior Court Clerk

Re: Franklin County Cause No. 07-2-50411-0

Case Title: Craig Mason vs
Columbia Basin College

Attached is:

xxx Motion for Reconsideration

___Granted _X_Denied ___Bench Copy Not Provided

___ Motion for Review of Commissioner's Decision

___Reversed ___Affirmed ___Modified

Comments:

***

PLEASE CHECK THE APPROPRIATE BOX AND/OR ADVISE IN COMMENT AREA

DATED THIS 14th DAY OF JULY, 2008

/s/William D. Acey
William D. Acey
Judge/Court Commissioner

Send
cc to: Parties/Counsel

## APPENDIX G

**STATE OF WASHINGTON**
**FRANKLIN COUNTY SUPERIOR COURT**

**NO. 07-2-50411-0**

**[Proceedings June 20, 2008]**

| | |
|---|---|
| CRAIG MASON, | ) |
| Plaintiff, | ) |
| vs. | ) |
| | ) |
| COLUMBIA BASIN COLLEGE, COLUMBIA BASIN BOARD OF TRUSTEES, LEE THORNTON, RICH CUMMINS, MEG WOODS, AND THE MARITAL COMMUNITY OF MEG WOODS AND RICH CUMMINS, DAVID SHAW AND THE MARITAL COMMUNITY OF DAVID SHAW AND JANE DOE SHAW, DEBORAH MEADOWS AND THE MARITAL COMMUNITY OF DEBORAH MEADOWS AND MIKE GRINNELL, RUBEN LEMOS AND THE MARITAL COMMUNITY OF RUBEN LEMOS AND JANE DOE LEMOS, AND BILL MCKAY AND THE MARITAL COMMUNITY OF BILL MCKAY AND JANE DOE MCKAY, | ) |
| Defendants. | ) |
| | ) |

TRANSCRIPT EXCERPT

[p.52]

about this, he would come meet with me and reassure me orally. And that's why I was suspicious, but it was still hard to believe that they would be this treacherous and be this willing to engage in fraud.

So I -- we do have a genuine issue of fact to go forward on. Again, if -- as we approach trial, on the first day of trial that might be an appropriate time to see if we have enough for a reasonable jury to conclude on my behalf, but we have raised proper issues of fact under Berg and its progeny to go forward.

Thank you.

THE COURT: Thank you. Okay. Let me just briefly go back over the termination of tenured employment relationship agreement executed between the parties. And I believe the president of the college signed it on October 22 of '03 and the plaintiff signed it and was notarized on October 24 of '03. You promised you would never sue him again; you did. It's in writing. You promised never to sue him again. The very last page, exactly two inches above your signature line, is in nice, big, bold print: This is a final release of all claims. Forget about the entirety agreement for half a second. You promised not to sue him. It was a final release of all claims.

MR. MASON: All claims --

[p.53]

THE COURT: Forget Flower for a half a second. What part of that didn't you understand?

MR. MASON: It's not a license to commit subsequent wrongs.

THE COURT: Time out. Wait a minute. What no reasonable mind can differ as to what the college expected to get for its 140 Gs.

MR. MASON: That's not so. That's not so. They --

THE COURT: Sir. Sir.

MR. MASON: Sure.

THE COURT: My turn to talk.

MR. MASON: Okay.

THE COURT: And I didn't interrupt you. So -- okay. Thank you for inviting me to reconsider my position one more time today. Again, the only thing that was preventing me from granting the motion for summary judgment coming into oral argument --

MR. MASON: Right.

THE COURT: -- other than not being predisposed and was willing to listen to argument of counsel and plaintiff, was the Flower case. And that caused me some concern. But the more I read the Flower case, the more I find it's distinguishable from this instance here

and is not legal authority to defeat motion for summary

[p.54]

judgment under the undisputed facts in this particular case. Reasonable minds can't differ.

And so I'm granting -- for the reasons requested by State's counsel, I'm granting defendant's motion for summary judgment. And, because you promised not to sue them and it was a final release of all claims, I am granting sanctions and terms. And I'll allow the State to submit a cost bill on that and we'll have to have a hearing on that later on as to what it will be.

MR. MASON: Okay. Thank you, Your Honor. May I put one more thing into the record?

THE COURT: Certainly.

MR. MASON: Okay. That -- again, that language you read is boilerplate. It was reassured to me repeatedly that it was not applicable to anything but their needs on their end bureaucratically. And that certainly no such language could be a license for future wrongs, but the point is that Berg and all of Washington law focuses on what was the meeting of the minds. And we have both with more time that we would request to be granted. And on the basis of the declarations to date, it's very clear that the meeting of the minds was one that reassured me and that I believed that that writing that you're emphasizing was insignificant except for

[p.55]

their bureaucratic needs. And so, agaln, this should get to the trier of fact so that fraud cannot be perpetuated using this technique.

Thank you.

THE COURT: So noted for the record.

MR. TRIESCH: Your Honor?

THE COURT: Yes, Counsel?

MR. TRIESCH: I wanted to point out that what I would do on the attorney's fees and costs is calculate those based -- we have a timekeeping system in the Attorney General's office. We have a charge back rate to the college. I'll put in whatever that is and I will approach Mr. Mason about that to see if we can avoid comlng back to court.

THE COURT: Well, I was going to suggest: I've got to double-back on July 25 at ten o'clock in the morning across the river at the justice center for up to about two hours. I certainly could pick this tame same time slot on Friday, July 25 at 1:30 for presentment and hearing on that if it became necessary.

MR. TRIESCH: Okay.

THE COURT: Can you check your calendars?

MR. TRIESCH: I can. I can't right now.

THE COURT: If it's an issue, can I give you my 24/7 cell phone number?

* * *

[p.64]

What is it? 185, 175?

MR. MASON: Yeah.

THE COURT: I can't remember.

MR. MASON: Yeah.

MR. TRIESCH: The case law requires --

MR. MASON: 484, 185.

THE COURT: 185. Yeah.

MR. TRIESCH: Case law requires that the Court make a factual finding, and I put that in there.

MR. MASON: Okay.

THE COURT: Yes.

MR. TRIESCH: There was a factual finding.

THE COURT: Yes. Yes, I do. He promised not to sue, he did, he wasn't supposed to, it was an entire agreement. It was frivolous. It should have never been brought.

MR. TRIESCH: Pardon me. May I have a copy of that, by any chance, to (inaudible)?

THE COURT: You can have an unofficial copy right now, but if you want to wait, the clerk might be able to go ahead and stamp it and get you --

MR. TRIESCH: That's what I would like.

THE COURT: Wouldn't you prefer a conformed, both of you?

MR. MASON: I would like those, too, please.

* * *

## APPENDIX H

**Superior Court of the State of Washington, Franklin County**

**Case Number: 07-2-50411-0**

**[Filed May 3, 2007]**

| | |
|---|---|
| Craig Mason, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| Columbia Basin College, Columbia Basin Board of Trustees, Lee Thornton, Rich Cummins, Meg Woods, and the marital community of Meg Woods and Rich Cummins, David Shaw and the marital community of David Shaw and Jane Doe Shaw, Deborah Meadows and the marital community of Deborah Meadows and Mike Grinnell, Ruben Lemos and the marital community of Ruben Lemos and Jane Doe Lemos, and Bill McKay and the marital community of Bill McKay and Jane Doe McKay, | ) |
| | ) |
| Defendants | ) |
| | ) |

**Complaint for Fraud, Breach of Contract, Intentional Infliction of Emotional Distress, and Related Claims**

To: Clerk of the Court, and Defendants named above.

Craig Mason, pro se, and of Ochoa Lawrence Law Group, PLLC., claims against the Defendants as follows:

## I. PARTIES, JURISDICTION, AND VENUE

1.1 Plaintiff, Craig Mason, was a resident of Benton County at times material herein, and formed the agreement at issue while employed at Columbia Basin College in Franklin County, and negotiated the agreement in Franklin County.

1.2 Defendants were residents of Franklin or Benton County at all times material herein, and were employed in Franklin County by Columbia Basin College (except the Trustees, who are volunteer appointees), and the fraud, breaches of contract, and other torts were committed in Franklin County. The Board of Trustees was doing the business of the college in Franklin and Benton counties.

1.3 Personal and subject matter jurisdiction exist in this case and venue is proper for this case in Franklin County, Washington.

1.4 The tort claim was filed in July of 2006 with the Office of Risk Management, and then filed again, amended to add the CBC Board of Trustees in

November of 2006. Over 60 days has passed since the last filing.

1.5 Named real persons are sued as agents of Columbia Basin College, and are herein sued as individuals, also personally liable for their actions.

## II. FACTS

### A. Background Factual Overview

2.1 Mr. Mason began teaching at Columbia Basin College (CBC) in the fall of 1988, after two years at the University of Washington School of Law, with service on the law review and a successful internship the summer of 1988 that led to a job offer from Preston Thorgrimson to serve as outside counsel for METRO, and to otherwise work in municipal law.

2.2 Responding to his lifelong interest in education reform -- that began with service on school board committees for District 81 while he was a student at North Central High in Spokane, Washington -- Mr. Mason took the teaching position with CBC in 1988, and finished his UW law degree and law review editing hours by August 1990, mainly in the summers of 1989 and 1990. Mr. Mason received his JD with high honors in August 1990.

2.3 Mr. Mason began his involvement in the administration of Columbia Basin College by serving as a faculty representative on the Contract Negotiating Team in June of 1990, and by becoming a member of the Curriculum Committee.

2.4 In June of 1991, Mr. Mason became the president of the CBC chapter of the Association of Higher Education (AHE). A cadre of older faculty had asked him to run for the position.

2.5 Shortly after becoming the AHE president in 1991, the Dean of Instruction, Polo Coronado, told Mr. Mason that he would need to constitute the Discipline and Dismissal Committee, under the contract, to punish a faculty member mentioned in student newspaper as "sexual predator." Instead of convening the committee, the administration spent the next year spreading rumors about English teacher Dave Abbott being the "sexual predator."

2.6 In January of 1992, Mr. Mason successfully defended a colleague from unjustified discipline, and the Trustees of CBC rescinded his discipline. At this point, Mr. Mason saw that CBC administrators were riven with abusive managerial behaviors and patterns of thought, and that CBC administrators were astonishingly ready to violate legal restraints upon their treatment of employees.

2.7 In the late winter and spring of 1992, CBC administrators tried to capitalize on their year-long rumor campaign against Mr. Abbott, and in early April drew the attention of the press to his abrupt suspension and being locked out of his office. Mr. Mason, the day before the suspension of Mr. Abbott, had told President Marv Weiss and Human Resource Director Ruben Lemos: (a) that there was no sexual harassment in their evidence, (b) that a suspension was legally inappropriate unless Mr. Abbott posed a threat of immediate danger to himself or others, and (c) that due process must be followed.

2.8 President Marv Weiss, two days later, told Mr. Mason that he wanted to fire Mr. Mason for insisting upon due process for Mr. Abbott. (Dave Abbott was restored to classes in the fall of 1992, and won an arbitration on these issues in summer of 1993. Although Mr. Abbott later settled his lawsuit with CBC, on nearly identical facts a Pacific Lutheran University professor won 1.1 million dollars at trial, at about the same time.)

2.9 Marv Weiss and Ruben Lemos began a slander campaign against Mr. Mason as a defender of sexual predators, even though the 1993 arbitrator found no evidence of any violation of any rules of sexual behavior by Mr. Abbott.

2.10 In March of 1993, President Weiss told faculty that there would be layoffs. Mr. Mason requested of Mr. Weiss that he follow contractual Reduction-in-Force (RIF) policy. Marv Weiss then told Trustees that CBC was not going to tenure some faculty because they were "low quality." (Weiss was announcing to the Board de facto firing, not "laying off.")

2.11 Mr. Mason asked Weiss to choose which it was, (a) RIF or (b) firing for failing to meet standards, and to follow the proper procedure for the appropriate cases. Weiss refused, and faculty took a 95% vote of no confidence in Weiss, and the trustees undertook an investigation.

2.12 Noel Commeree was selected by Marv Weiss to guide the investigation, in order to thwart it. In early 1994, the committee issued its report that was a complete cover-up of the wrongs, and in response to

more faculty and staff complaints, there was a second report undertaken, and that was even more of a cover-up, of many, many misbehaviors in the second report to Trustees. (Noel Commeree was given the Deanship of English and Social Sciences, as a reward for the cover-up. This was also done to punish Russ Schmeeckle who had the integrity to tell the truth while testifying during the Abbott arbitration in 1993. Mr. Commeree replaced Mr. Schmeeckle as the Dean of English and Social Science as dual corruption – to punish the only honest Dean, Schmeeckle, and to reward the corrupt Commeree.)

2.13 Faculty prepared to revolt at the cover-up. Weiss was fired, and gone by mid-1994.

2.14 Carl Opegaard was the interim president and the months through April of 1995 were uneventful as President Opegaard controlled the sick managerial culture of CBC. Dr. Opegaard only fired Weiss favorite, Public Relations Director, Mary Geiss, leaving the rest of the firing for Lee Thornton to do as the new president. Dr. Opegaard told Mr. Mason that he (Mr. Mason) had done a great job in keeping CBC on the "straight and narrow," and that Dr. Opegaard owed his own lawfulness as a president to having met people like Mr. Mason early in his own administrative career. Mr. Mason served on the hiring committee that selected Lee Thornton.

**B. The Cultivation of the Special Relationship**

2.15 Mr. Mason wished to return to academic work, after all of the foregoing turmoil, and to exit administrative participation upon the arrival of Lee Thornton as president of CBC in April of 1995.

However, it was Lee Thornton's first presidency, and he was dependent upon Mr. Mason. At first, it seemed that he relied upon Mr. Mason's institutional knowledge and ethics; however, as time passed, it became clear that Lee Thornton had no moral courage. Russ Schmeeckle, in May of 1995, told Mr. Mason, "Oh my god you have hired Hamlet." To which Mr. Mason replied, "No, I have hired Benito Cerano."

2.16 Mr. Mason asked Lee Thornton to distrust all of his administrators, and Mr. Mason offered that he was willing to have Lee distrust him, as well, if that was the price for getting him to be skeptical. Mr. Mason repeated this plea after Lee Thornton caught Dean Noel Commeree in overt lies (including lying to subordinates about what Lee had said, that is using lies to incite insubordination). President Thornton said, "I cannot live that way," and insisted upon "positive thinking." Mr. Mason gave Lee Benito Cerano, by Melville, and The Shadowline, by Conrad, to read and discuss. Even after that discussion, Lee was unwilling to assume full responsibility for running the college. Lee Thornton relied upon his religion, Christian Science, as his rationale for needing to engage in "positive thinking" that ignored reality. But the sick managerial culture of CBC perpetuated itself on deceits that President Thornton was unwilling to contradict or puncture.

2.17 Mr. Mason resumed deep involvement in curriculum, labor-management issues, and in development of policy and procedure. After another year of this, Mr. Mason took a position as a Visiting Professor of Government at Eastern Washington University for the 1996-97 academic year. Mr. Mason believed that his year away from CBC would force Lee

Thornton to grow into the duties of being a college president.

2.18 The Plaintiff, Craig Mason, had such a successful year of teaching at EWU, that EWU offered him immediate tenure to stay. However, Lee Thornton was having numerous problems with faculty and staff, and was threatening to quit, as regularly communicated to Mr. Mason via email. Mr. Mason still felt responsible toward Columbia Basin College, and for Lee Thornton's success as a president, and Mr. Mason returned to CBC in the fall of 1997.

2.19 Clearly, this shows a special relationship of trust and dependence. Lee Thornton created a teaching position in the accounting department so that Dunyele Mason (then Mr. Mason's wife) would have a job at CBC to further induce Mr. Mason to return to CBC.

2.20 From 1997 until 2000, Mr. Mason assumed an enormous amount of responsibility at CBC, while still teaching fulltime. He undertook the difficult task of the Governance Self-Study for Accreditation. When the faculty continued to resist assessment to the degree that success in accreditation was threatened, President Thornton asked Mr. Mason to spearhead the effort to develop assessment at CBC. Again, due to the special relationship, Mr. Mason undertook this odious task, and succeeded in developing the "Syllabus Project" that achieved enough assessment to get Columbia Basin College successfully through accreditation.

2.21 In myriad ways, from developing curriculum and new grant projects, to developing other politically

very difficult projects (e.g. developing a Student Complaint Process faculty could accept), Mr. Mason undertook volatile projects that required enormous amounts of skill and compromise to bring to successful conclusion. These were all done to help make President Thornton's administration a success.

2.22 As part of the assessment project, and as part of continuing his ongoing work to raise academic achievement at CBC, Mr. Mason worked with other English teachers to increase the use of exit exams in the English Department.

2.23 All of these projects were undertaken by Mr. Mason at the specific request of President Lee Thornton who had cultivated a special relationship of trust with Mr. Mason. Lee Thornton had sought out Mr. Mason for friendship in 1995, and had made use of this special relationship to induce Mr. Mason to undertake the politically challenging, but institutionally necessary, projects. Had President Thornton not called upon Mr. Mason's friendship for these special requests, Mr. Mason would not have undertaken the accreditation governance review, development of assessment (which became the "Syllabus Project"), developing the Student Complaint Process, nor any other such projects that were extremely difficult to execute.

2.24 Additionally, Rich Cummins had cultivated a special relationship of trust with Mr. Mason. Mr. Cummins had come to loathe teaching by 1994 – always complaining how stupid students were and how they did not learn anything. Rich Cummins sought Mr. Mason's support for his sabbatical, granted by Lee Thornton in 1996, and then asked Mr. Mason's support

as Mr. Cummins' sought to move into the administration of CBC. Throughout, Rich Cummins always played the part of friend, and of defender of academic standards, to Mr. Mason.

**C. The Precursors to the Agreement at Issue**

2.25 From the summer of 2000 until 2001, Tom Keegan was the Vice-President of CBC. Tom Keegan thought Rich Cummins was a whiney wimp and cut him out of administrative participation as much as he could.

2.26 Tom Keegan would also come visit Mr. Mason and tell him that Mr. Mason was suffering too many "hits" by doing all of Lee's heavy-lifting. Dr. Keegan told Craig Mason that Thornton in fact was betraying Mr. Mason by never backing him against opponents to these necessary projects, which Dr. Thornton had asked Mr. Mason to take the heat to develop. Dr. Keegan left CBC "early" (compared to what he had promised Lee Thornton) because of his low opinion of President Thornton – mainly disliking his lack of courage, and his unwillingness to stop misbehavior among administrators – and because Tom Keegan worried that Lee's cowardice was going to blow up into a mountain of bad publicity for CBC. Also, Tom Keegan would often warn Mr. Mason that Dean Deborah Meadows was undermining him in a million sly ways. Dr. Keegan noted how she used her counseling skills to incite anxiety in people, and then to direct their anxiety to particular people and to paranoid theories, creating enemies for Mr. Mason. Dr. Keegan also warned Mr. Mason that Dean Meadows was using the anxieties aroused in faculty by assessment and related projects to focus that anxiety

into resentment of Mr. Mason. Finally, Dr. Keegan emphasized that Lee Thornton knew this, and yet Dean Meadows acted with impunity.

2.27 Mr. Mason, still wishing to focus on pedagogy, again resisted formally entering the administration after Dr. Keegan left to become president of Peninsula College, and Mr. Mason suggested to Dr. Thornton that Rich Cummins be made Vice-President. Mr. Cummins had promised Mr. Mason that he would defend academic standards, and that he would reign in the administrators who were all still carry-overs from the Weiss regime or had imbibed its culture. (The few administrators who were new to administration at CBC were acculturated into the sick managerial culture of CBC – the sick culture that Lee had refused to change through all of his years in "power.")

2.28 In the spring of 2003, Cliff Wakeman, an English teacher, found good statistical evidence that one English teacher was helping his students to cheat on the exit exam out of remedial English.

2.29 Mr. Mason then pushed for the professionally ethical next step – an investigation. Mr. Mason always had to "push" to make the right thing happen at CBC, because the "danger" of "controversy" was always something that Lee Thornton would resist and fear. However, in the past, after the right thing had been done, Lee Thornton would thank Mr. Mason for pushing for professional behavior. Mr. Mason always pointed out that ethical behavior reduced overall "danger and controversy" in the long run. However, no matter how many times Mr. Mason had

proven this truth to Dr. Thornton, Lee still quailed at overcoming any short-term pressures.

2.30 After his divorce in the year 2000, Dr. Thornton feared bad publicity even more than he had before. Because of this fear, Thornton strongly resisted any investigation of this cheating. Mr. Mason insisted that the integrity of the transcript was one of the most important things any school or college could have. The transcript is the official statement of what has been produced by the institution; the transcript is its most fundamental product. Mr. Mason turned to Mr. Cummins as an ally to help get Lee to do the right thing.

2.29 However, President Thornton offered then-Vice-President, Rich Cummins, the bribe of an eventual presidency to thwart Mr. Mason's push for an investigation. This betrayal of academic standards by both Lee Thorton and Rich Cummins led Mr. Mason to begin to consider leaving CBC. (Lee Thornton subsequently made Rich Cummins the interim president of Columbia Basin College, fulfilling the "pay off," for hiding the potential scandal. This is a promise Lee Thornton found worth keeping, that is a promise to suborn a duty.)

2.30 Lee Thornton and Rich Cummins had also undermined Rich's wife, Meg Woods, who had been on the tenure review committee of Gwen James, an English teacher. Meg Woods and Cliff Wakeman wanted to postpone Gwen James' tenure, and, as was allowed under the contract, WAC and RCW, and sought to have Ms. James remain on probation for another year. Gwen James had begun personal relationships with an astonishing range of faculty, and

apparently threatened to allege sexual retaliation for her non-tenure.

2.31 English faculty member, Brad Sealy, previously a defender of academic standards, sided with Gwen James. Lee Thornton told Mr. Mason that Lee believed that Gwen James had used sex to change Mr. Sealy's alliance. Mr. Mason advocated that no matter what personal relationships existed, the improving achievement of the English department had to be supported, and the courage of Cliff Wakeman and Meg Woods in not simply rubber-stamping Ms. James' tenure should also be supported.

2.32 Foreshadowing the betrayal of standards about the cheating on the English exit exam, Lee Thornton got Rich Cummins to side with him. Thus, they allowed Gwen James to receive tenure without another year of probation, and they showed faculty that any defense of academic standards would not have administrative support.

2.33 Mr. Mason filed a tort claim in the spring of 2003 to try to shock Lee Thornton into realizing that he had more to lose from abandoning standards than from defending them. (The CBC administrators had committed continuous torts, for a dozen years, against Mr. Mason in resentment of, and retaliation for, his ability to impose legal constraints upon their abusive behavior. Mr. Mason had foregone very clear legal claims, all those years, for the good of CBC, and from a belief that he could work from within the institution to improve it.)

2.34 Morally sickened that President Thornton and Rich Cummins had completely abandoned

academic improvement in the pursuit of short-term ease, Mr. Mason prepared to use the tort claim as a vehicle to negotiate his departure from Columbia Basin College.

2.35 Mr. Mason still enjoyed the teaching and valued his academic pursuits, but he knew that he could not stay in such an academically corrupt institution, and, in deference to his now-shattered friendships with Lee Thornton and Rich Cummins, Mr. Mason was choosing to leave rather than have to turn against former friends. President Thornton was fully informed by Mr. Mason that he was choosing to leave rather than be forced to terminate the presidency of Lee Thornton. Mr. Mason believed that no matter how disappointed he was, that a special relationship with Lee Thornton and Rich Cummins still existed. Lee Thornton and Rich Cummins pretended that such a relationship still existed, abusing Mr. Mason's trust to prevent Mr. Mason from raising the issues that would properly lead the Trustees to fire them. In short, Mr. Mason was departing CBC so that either Lee and Rich would be shocked into better behavior, or so that they would precipitate their own firings at the hands of others.

2.36 As evidence of this special relationship, in early May, 2003, Rich Cummins came to Mr. Mason's home, sat on his deck, and wanted to tell him this face-to-face this: *Lee Thornton had promised Rich a presidency if Mr. Cummins could stop any investigation into the cheating on the English exit exams.* Both men knew that Mr. Mason could absolutely force the issue. Instead, Mr. Cummins asked Mr. Mason that he understand that Mr. Cummins' ambition was more important than

determining, and protecting, the integrity of the transcripts of Columbia Basin College. Mr. Mason did not agree that such a betrayal of essential professional values could be "understood," and Mr. Mason was debilitated by moral sickness that Rich and Lee had sunk so low in their ethics.

### D. Agreement at Issue

2.37 Mr. Mason was now ready to leave CBC. However, he was very concerned for the fates of Farhad Arshad, Matt Mathesius and Cliff Wakemen, given the deeply abusive and dishonest administration of CBC. The Association of Higher Education, and the Uniserv Representatives had been insufficient to the task of defending faculty before Mr. Mason took over that work in 1992. The faculty union lacked the diligence to dig through the sophisticated webs of lies and self-referential deceit that CBC administrators would concoct. This union incompetence at factual investigation is why Mr. Mason was so intent upon assuring Farhad, Matt, and Cliff that the sophisticated character assassination tactics of CBC administrators would not be unleashed against them. Without this assurance from Lee Thornton, Mr. Mason would have felt morally bound to stay at CBC to defend those men's rights.

2.38 Farhad Arshad was a dynamic and extremely competent sociology teacher. However, he caused "controversy" on occasion. The controversy was legitimate academic debate, but with Lee Thornton's increasingly enhanced desire to avoid all controversy, Mr. Arshad was an obvious possible target of the rumor-spreading, character-assassinating, student-

complaint-soliciting administrators Lee had never controlled.

2.39 The same was true of Matt Mathesius – he was academically challenging, and had earned the opprobrium of slothful English faculty who did not want increased academic demands in the English curriculum. Additionally, the completely inept Human Resources Department of CBC had allowed, in 2001, a minor tiff between Mr. Mathesius and an aggressive secretary, Vanissa Smithson, to become a wild story. Human Resource Director, Ruben Lemos, even spread rumors that Ms. Smithson had photos to show how Mr. Mathesius had bruised her. The complete mismanagement of human resource procedures incited Ms. Smithson to petition the prosecutor to bring Mr. Mathesius to trial for assault. At trial, it turned out there were no photos, there were no bruises, and the jury believed Mr. Mathesius that Vanissa Smithson had shoved him back from the faculty lounge, believing he was a student. But this out-of-control rumor-mongering had given CBC some bad publicity, and most of the administrators blamed Mr. Mathesius, and still spread rumors about him as if this farcical charge had truth to it. That is why Mr. Mathesius' treatment was a basis of the bargain at issue. Despite President Thornton swearing to Mr. Mason an oath that Mr. Mathesius would suffer no more negative employment actions (sworn *as a material inducement to get Mr. Mason to sign the already-drafted partially integrated document at issue)* in the spring and summer of 2004, Mr. Mathesius was again under ferocious administrative attack, wrongfully suspended, and faced with attempts to fire him.

2.40 Finally, Cliff Wakeman was being retaliated against in sly and circuitous ways for finding the statistics that showed the likely cheating on the exit exam. This retaliation included being deprived of philosophy classes as part of his regular teaching load. All rationales presented to him were pretextual.

2.41 As a crucial part of negotiating the settlement of his tort claim with CBC, Mr. Mason got repeated assurances from Lee Thornton that Farhad, Matt, and Cliff would be "safe" if Mr. Mason left and was no longer at CBC to defend due process. These representations were causally vital. "But for" those assurances, Mr. Mason would not have left CBC.

2.42 A "written" agreement was drafted that met CBC's requirements for settlement, through the expedient of Mr. Mason "selling" CBC his tenure. However, **that "writing"** was **explicitly NOT what either party had in mind as their reasonable and objective meeting of the minds**. It was known to BOTH parties that this writing was a *partial integration of their true, objectively negotiated, agreement*. The true bases of the bargain, and material inducements, were orally promised representations by which Lee Thornton (a) swore that the writing was NOT a complete integration, and (b) that the safety of Matt, Farhad and Cliff was assured, and (c) that the character assassination of Mr. Mason by CBC administrators would end.

2.43 Even after this "writing" was formulated in the early fall of 2003, Mr. Mason met with Lee Thornton and told him that he had decided NOT to sign the "sale of tenure" agreement, precisely because of Mr. Mason's doubts that Farhad, Matt, and Cliff

would be safe. Lee Thornton, as a fundamental basis of the bargain, and inducing crucial reliance, swore to Craig Mason that there would be no negative consequences at all for Farhad Arshad, Matt Mathesius, or Cliff Wakemen. Lee Thornton gave his absolute oath as a man, and on his honor.

2.44 "But for" this fraudulent representation, Mr. Mason would have never signed his settlement agreement to leave Columbia Basin College.

2.45 Mr. Mason believed that he still had enough of the special relationship Lee Thornton had cultivated to be able to trust Lee on these matters. This belief would be reasonable to all but the most craven of humans.

2.46 Rich Cummins also made the same promises to Mr. Mason about the safety of Farhad, Matt, and Cliff from administrative assault.

2.47 Deans Deborah Meadows and Dean Bill McKay knew of, and had notice of, these promises. David Shaw knew of, and had notice of, these promises. Ruben Lemos knew of, and had notice of, these promises. Meg Woods knew of, and had notice of, these promises. Attorney General Kevin Hartze also knew of these promises.

**E. Facts of Fraud, Breach of Contract and of Special Relationship, Intentional Infliction of Emotional Distress, and Other Wrongs**

2.48 Lee Thornton knew that he was inducing Mr. Mason to rely upon his representation that Farhad, Matt, and Cliff would be safe. Thorton intended to

induce reliance with his intentional misrepresentation, and did in fact induce reliance, since this representation was so material to the bargain that "but for" this inducement, occurring after the partially integrated writing was finalized, Mr. Mason would not have agreed to settle with CBC by selling CBC his tenure. This representation was false, and Lee Thornton knew it was false. Mr. Mason had no idea that the treachery and betrayal ran so deep in Rich Cummins and in Lee Thornton, as it was unreasonable that Thornton could be so ungrateful after all of the hard work Mr. Mason had done at his request, for so many years. Mr. Mason relied in fact, and had a legal right to rely upon President Thornton's oaths and promises. A consequence of this fraud and deception was devastating psychological anguish for Mr. Mason.

2.49 Lee Thornton knew that he was abusing a special relationship that he had cultivated for over eight years when he defrauded Mr. Mason and abused Mr. Mason's trust.

2.50 Vice-President Rich Cummins knew of all of these promises when he facilitated the violation of these promises by attempting to fire Farhad Arshad and Matt Mathesius in the spring of 2004 and onward, and by giving Cliff Wakeman less desirable classes on superficial pretenses.

2.51 Dean Deborah Meadows knew of the promises made by Lee Thornton, and delighted in breaking them in regard to Farhad, Matt, and Cliff. Dean Meadows spread rumors about Mr. Arshad, and tried to place false charges into his personnel file, and continued to solicit student complaints until Mr. Arshad was forced out of CBC in the summer of 2005,

due to the health impacts of his treatment by CBC administrators, after which Mr. Arshad sued CBC in Federal Court.

2.52 Dean Bill McKay knew of the promises at issue, and abused Matt Mathesius and Cliff Wakeman with that full knowledge.

2.54 David Shaw assisted in the negotiation of the partial integration of the agreement (fully knowing that the real agreement was a meeting of the minds external to the written document), and David Shaw also violated these promises, and actively facilitated Lee Thornton's breach of the primary agreement.

2.55 Meg Woods and Ruben Lemos also facilitated the harm against Farhad, Matt, and Cliff, in full knowledge of the agreement at issue.

2.56 Attorney General Kevin Hartze also was fully aware of the objective meeting of the minds, and helped construct a partial integration that could pass muster under state law, while knowing the terms of the true agreement that was reached between Lee Thornton and Craig Mason. However, the Plaintiff recognizes that an attorney's role in facilitating a fraud has its privileges due to the role of an attorney, and that this issue is complicated by Mr. Hartze representing the college, the president, the administration, and the State of Washington, as he carried out the drafting the partially-integrated agreement, and then he helped carry out the breach of that agreement. (This seems to be a matter of first impression in Washington just what an Attorney General's duties are, and perhaps proscriptive relief will be all that is justified.)

2.57 The agreement at issue was *partially integrated by deliberate design*. The following written items were *partial consideration* for Mr. Mason "selling" CBC his tenure: (1) acknowledgement that Mr. Mason had never violated a law, statute, or rule of CBC; (2) the payout amounts for the "sale" of Mr. Mason's tenure; and (3) the confidentiality of the agreement. This *partial consideration* was only a portion of what was being offered by the college to settle the claims of 2003. Given the years of slanderous attack on Mr. Mason by CBC administrators, despite his perfect record, it was also of crucial importance that there be no future slander against him – this was an explicit oral term of the contract. The oral agreement, sworn by President Thornton, ***to protect*** *Farhad Arshad, Matt Mathesius, and Cliff Wakemen* ***from wrongful administrative attacks*** *were absolutely, certainly, and* ***explicitly the "basis of the bargain."*** At the conclusion of creating the "writing" that partially integrated the agreement, and for days thereafter, Mr. Mason refused to accept the deal until President Thornton met with Mr. Mason at the Double Tree Inn across 20th Avenue from CBC, and Lee Thornton swore that no administrative action would be taken against Farhad, Matt, and Cliff. President Thornton swore these oaths to get Mr. Mason to sign the agreement "selling" CBC his tenure, as the written façade of the actual contract.

2.58 Dr. Thornton, Kevin Hartze, and David Shaw had all participated in creating an agreement that was meant to "get around" various state requirements, while remaining legal. Mr. Mason was no longer participating in the administration of CBC, and left those details between President Thornton, Dave Shaw, the Trustees and the Attorney General,

Kevin Hartze, to work out among themselves. *Throughout the negotiations, President Thornton swore to Mr. Mason that the agreement meant what he and Mr. Mason were objectively and orally agreeing, NOT what the contract literally said.* The behavior of all relevant parties also verifies this allegation. Dave Shaw, Bill Saraceno, or Kevin Hartze might ostentatiously send an email saying that CBC "could not" make this agreement provision or that provision, but then Lee Thornton would immediately privately meet with Mr. Mason and make the guarantee sought – this "two-tiered" negotiation process was continuous, and Lee Thornton used his relationship with Mr. Mason to procure his trust that the "unwritten inducements at the basis of the bargain" could be relied upon. The contract at issue was explicitly and always a partially integrated agreement.

2.59 Mr. Mason gave repeated assurances, based upon these promises, to Mr. Arshad and Mr. Mathesius that they would be safe, and reassured both men that Lee Thornton would keep his word. President Thornton's fraud cost Mr. Mason these two friendships, as Mr. Arshad and Mr. Mathesius were attacked, and felt abandoned by Mr. Mason, due to his departure. And both men felt lied to in that Mr. Mason had bonded his own integrity as a guarantee that Lee Thornton would not be so venal as to violate such a profoundly sworn oath as Lee had made.

2.59 Given that President Thornton believed, as a Christian Scientist, that mental health produced bodily health, it makes it all the more malicious that Lee Thornton was willing to impose the most profound moral disgust, moral sickness, and sense of betrayal upon Mr. Mason, when, from Lee's own worldview,

little else could be as harmful, psychologically or physically.

2.60 The CBC Board of Trustees heard a one-sided presentation of manufactured (false) "facts" before illegally suspending Dave Abbott in 1992. The CBC Board of Trustees continued to listen to one-sided presentations of "facts" throughout the subsequent years, and never adopted professional protocols of careful fact-gathering. This lack of professional protocol led the Trustees to continue to play a vital role in perpetuating managerial abuse of due process and other rights. In addition to responsibility for their agents, the Trustees are themselves culpable as a body for allowing the widening gyre of immoral administration to engulf CBC.

2.61 The damage to Mr. Mason is profound and deep, on his person and on his career. Mr. Mason certainly would not have undergone the agony of these events for two million dollars, and not even for four million dollars. The impacts on his health, reputation, career, and life, including life expectancy, have been extreme.

## III. CAUSES OF ACTION

3.1 Fraud: Fraud is herein pled specifically that Columbia Basin College, and its agents personally (especially Lee Thornton and David Shaw) *misrepresented* their intentions to obey the agreement; (2) this misrepresentation was *material* in that without this inducement Mr. Mason would have never left CBC, nor accepted the agreement; (3) the *falsity* of the misrepresentation became palpable by the spring of 2004, as Matt Mathesius and Farhad Arshad were

nearly fired due to the vigorous attempts by the administration, spear-headed by Rich Cummins; (4) Lee Thornton and the other agents of CBC *knew of the falsity* of their intention as they were making these misrepresentations; (5) the agents of CBC *knew that the Mr. Mason would rely* upon their misrepresentations, and it was their *intent to induce reliance* by Mr. Mason upon these fraudulent representations, and it was fully the CBC agents' intent that these misrepresentations would be acted upon by Mr. Mason, especially trusting to his special relationship with Lee Thornton; (6) Mr. Mason was *ignorant* of the fraudulent intentions of the agents of CBC who negotiated with him; (7) Mr. Mason *relied in fact* on the truth of the fraudulent representations that by his withdrawal from CBC these evils against himself and others would cease; (8) Mr. Mason had the *legal right to rely* upon the representation that Lee Thornton, Dave Shaw, and Rich Cummins would control their abusive subordinate administrators, because it was unreasonable for Mr. Mason to believe that after all of the political pressure that he had taken for President Thornton, and all of the other difficult projects he had accomplished for CBC that Lee Thornton would have such treacherous intent, and it was very *reasonable to believe* that President Thornton and the agents of CBC would uphold their end of this bargain; and (9) the *damages* suffered by Mr. Mason, both personally, and vicariously through the attacks on his explicitly bargained for third party beneficiaries was extensive. Among other harms, the betrayal made Mr. Mason look like a fool to himself and others, inflicting severe emotional and reputational harm. These elements will be proved by clear, cogent and convincing evidence. (Negligent

Misrepresentation is included as an allegation on the elements outlined in this section.)

3.2 Breach of Contract: The contract was breached in myriad ways, including the fraud at issue, causing specifically known and foreseeable financial, emotional, and reputational harm.

3.3 Breach of the Special Relationship and the Covenant of Good Faith and Fair Dealing: Lee Thornton had cultivated a special relationship with Mr. Mason such that Mr. Mason believed he could confide in, and specially rely upon, the representations of Lee Thornton. The bad faith of Lee Thornton breached that resultant covenant of good faith and fair dealing. President Thornton very specifically relied upon this special relationship at the point that the partially integrated document was fully drafted, and Mr. Mason had decided to stay at CBC so he could protect Farhad, Matt, and Cliff, just as he had been forced to protect numerous faculty for the previous dozen years. Lee Thornton swore a personal oath to Mr. Mason, knowing full well that Mr. Mason had never before seen Lee Thornton breach such an oath. The subsequent betrayal of Mr. Mason was only possible because of the special relationship. Mr. Mason also had special relationships with Rich Cummins and Meg Woods, who used them to deceptive advantage.

3.4 Intentional (and Negligent) Infliction of Emotional Distress: The agents of CBC very specifically took delight in attacking Mr. Arshad, Mr. Mathesius, and Mr. Wakeman. The administrators had been wanting to attack them. (That is why their safety from attack was explicitly bargained for by the agreement at issue. Their protection from

administrative abuse was explicitly bargained for by Mr. Mason, and promised by Lee Thornton.) Also, the agents of CBC took specific delight in causing the mental anguish to Mr. Mason by their attacks on these men, and the agents of CBC took specific delight in knowing that causing Mr. Mason mental distress in violation of the agreement would then cause Mr. Mason a second-level of anguish to learn that President Thornton had been the point-man of a complete deception and fraud, given that Mr. Mason had vouched for the soundness of Dr. Thornton's oath. In short, CBC administrators maliciously reveled in this fraud as a source of mental anguish for Mr. Mason to suffer, for reasons of anguish specific to Mr. Mason, who takes "one's word" very, very seriously. (Negligent infliction of emotional distress is also pled, as the defendants had so stressed Mr. Mason as to cause his stomach to bleed in May of 2004, and otherwise to manifest physical impacts of this abuse. However, the vast majority of the frauds and torts at issue are really intentional, with negligence alleged only to the extent the CBC administrators managed "collateral negligent damage" in addition to their intentional harm.)

3.6 Tortious Interference with Contract: Dean Deborah Meadows, Rich Cummins, David Shaw, and Meg Woods, and other agents of CBC, very specifically set out to breach, and cause breaches of, the agreement that Lee Thornton had negotiated with Mr. Mason. In some instances, they believed that they could misrepresent the partially integrated document as a complete integration, and thus inflict damage with impunity. In other instances, their desires to aggress against Matt Mathesius, Farhad Arshad, Cliff Wakeman, and against Mr. Mason, were simply more

than they could control, and neither President Thornton nor David Shaw would control them.

3.7 Defamation: Deborah Meadows and other agents of CBC spread rumors that there were secret reasons that Mr. Mason had left CBC that were damaging to Mr. Mason's reputation. Deborah Meadows breached confidentiality of the agreement to spread rumors to instructors David Arnold, Russ Schmeeckle, and others. The other agents of CBC did the same.

3.8 Interference with Future Employment: The agents of CBC slandered Mr. Mason when he applied for employment subsequent to leaving CBC, and deliberately interfered with his employment opportunities. Despite Mr. Mason's years of hard work, including being consistently ranked by students in the top 10% of teachers, Mr. Mason was unable to procure a teaching position after scores of applications.

3.9 Restitution: Mr. Mason seeks to be "made whole" from the inequitable actions of Columbia Basin College and its agents.

3.10 Abuse of Process: Agents of CBC maliciously misused contractual and statutory processes to inflict harm upon Mr. Mason

3.11 Other Claims: The facts alleged support claims of outrage, various tortious interferences with bargained-for expectancies, and deliberate attempts to harm Mr. Mason in his business, career, and reputation.

3.12 Leave to Amend: Other claims and legal theories may be added to this complaint, but notice of the fundamental facts of the case has been provided in this complaint. Federal causes of actions appropriate to these facts, for example, might be added for violations of rights as a motive to this fraud and abuse, or any other leave to amend to comport with the evidence under CR 15(b) and any other right.

## IV. CAUSATION

4.1 These foregoing violations of the statutory, common law, and contract rights of Mr. Mason were the cause in fact of his harm. "But for" these violations, Mr. Mason would not have suffered harm.

4.2 These foregoing violations of the statutory, common law, and contract rights of Mr. Mason were the proximate causes of his harm. The harm was known, foreseen, reasonably foreseeable, and the harm was also against public policy, and produced against known legal and moral rights. Much of the harm was not only reasonably foreseeable, but was specific knowledge held by the defendants, of which they had full notice.

## V. DAMAGES

5.1 Mr. Mason requests such monetary and equitable damages as shall make him whole.

5.2 Monetary damages as appropriate to what Mr. Mason gave up, and then lost, when he left Columbia Basin College under these conditions of fraudulent inducement.

5.3 Monetary damages as appropriate to the emotional anguish suffered by Mr. Mason on his own behalf, and on behalf of the other CBC employees who were explicitly third-party beneficiaries of the agreement.

5.4 Monetary damages as appropriate to Mr. Mason selling his tenure "cheaply" – below what it was worth to him – because of the special relationships pled, and because of the fraudulent inducements, cited above – and as appropriate for the other subsequent wrongs.

5.5 Monetary damages as appropriate to the career damage inflicted upon Mr. Mason by CBC and its agents.

5.6 Monetary damages as appropriate to the reputational damage deliberately inflicted upon Mr. Mason in deliberate breach of the agreement, and of the law.

5.7 Monetary damages as appropriate to all violations of the law, in addition to violations of the contract at issue, and the fraud at issue.

5.8 All damages of which CBC and its agents had specific knowledge, rendering them foreseeable, and their scope certain.

5.9 These damages are requested at four million dollars.

5.10 All equitable relief as the court deems appropriate.

5.11 Attorneys fees and costs under relevant case law and statutes.

5.12 Exemplary damages as might be appropriate.

## VI. JURY DEMAND

6.1 The plaintiff intends for this case to be heard before a jury.

## VII. RELIEF REQUESTED

7.1 Mr. Mason requests all legal and equitable relief that is available under statute, case law and equity.

7.2 All other legal and equitable relief as is found to be appropriate.

7.3 All recompense for attorneys fees and costs at trial as found to be appropriate, under statute or case law.

Respectfully submitted and Sworn

/s/ Craig A. Mason
Craig A. Mason, WSBA# 32962
Attorney for Plaintiff, Pro Se

## APPENDIX I

**STATE OF WASHINGTON**
**FRANKLIN COUNTY SUPERIOR COURT**

**NO. 07-2-50411-0**

**[Filed March 24, 2008]**

| | |
|---|---|
| CRAIG MASON, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| COLUMBIA BASIN COLLEGE, COLUMBIA BASIN BOARD OF TRUSTEES, LEE THORNTON, RICH CUMMINS, MEG WOODS, AND THE MARITAL COMMUNITY OF MEG WOODS AND RICH CUMMINS, DAVID SHAW AND THE MARITAL COMMUNITY OF DAVID SHAW AND JANE DOE SHAW, DEBORAH MEADOWS AND THE MARITAL COMMUNITY OF DEBORAH MEADOWS AND MIKE GRINNELL, RUBEN LEMOS AND THE MARITAL COMMUNITY OF RUBEN LEMOS AND JANE DOE LEMOS, AND BILL MCKAY AND THE MARITAL COMMUNITY OF BILL MCKAY AND JANE DOE MCKAY, | ) |
| | ) |
| Defendants. | ) |
| | ) |

## DEFENDANTS' MOTION AND MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

### I. NATURE OF THE CASE

Craig Mason claims the defendants (hereafter collectively referred to as "the College") took employment actions toward three Columbia Basin College faculty after Mason voluntarily resigned his employment. He claims that by doing so, the College breached its separation agreement with him, giving him claims for breach of contract and in tort.

The College denies Mason's claims and alleges that he lacks standing to sue for wrongs allegedly done to three faculty members. The College also alleges that Mason has no factual basis for this lawsuit, that this lawsuit expressly violates the waiver and release covenants of the "Agreement Between Craig Mason And Columbia Basin Community College District 19,"[1] and that this action is frivolous, advanced without reasonable cause, and is interposed for improper purposes. The College seeks dismissal with prejudice, an award of attorney fees and costs pursuant to RCW 4.84.185, and an award of sanctions pursuant to CR 11.

### II. RELIEF REQUESTED

The defendants move for an order dismissing the plaintiffs claims, awarding attorney fees and costs,

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[1] *See* Triesch Declaration, Exhibit 2 (Mason deposition excerpts), Deposition Exhibit 1 (Agreement Between Craig Mason And Columbia Basin Community College District 19.)

pursuant to RCW 4.84.185, and imposing sanctions, pursuant to CR 11.

## II. STATEMENT OF FACTS

### A. Mason's Employment And Resignation Agreement.

Between 1988 and 2004, the Columbia Basin College employed Mason as a teacher. Triesch Decl., Exh. 1, ¶ 2.1 (Complaint); Exh. 2 (Mason Deposition Excerpts), p. 19:16-19. Mason completed a law degree at the University of Washington during that time. Triesch Decl., Exh. 2, pp. 10:20-11:10. He is a practicing attorney licensed in the State of Washington.

On October 24, 2003, in exchange for $140,000.00 and the college's acceptance of his resignation, Mason entered an agreement with the college to relinquish his tenure and terminate his employment. *See* note 1. As part of that agreement, Mason released any legal claim he had or that he may have in the future "against the College, the State of Washington, and/or any officer, trustee, employee, student, or agent of any of them." Triesch Decl., Exh. 2, Dep. Exh. 1, pp. 1, 3, 6, and 8.

The College accepted Mason's voluntary resignation and paid him $140,000.00. Triesch Decl., Exh. 2, pp. 20:7-12; 31:1-4. Mason admits that the College abided by the terms of the agreement. *Id.* at p. 32:1-13.

**B. Mason's Tort Claim and Lawsuit.**

Less than three years later, on July 3, 2006, Mason filed a tort claim against the College with the Office of Financial Management, Division of Risk Management, seeking $4,000,000.00. Agar Decl., Attachment A (Tort Claim). Mason alleged that by taking actions toward faculty members Matthew Mathesius, Farhad Arshad, and Cliff Wakeman after Mason's departure, the College intentionally harmed, defrauded, and inflicted emotional distress upon Mason, and slandered and retaliated against him.[2] *Id.*

Mason's claim states, in part:

> I filed a tort claim in 2003, and then withdrew it settling very cheaply with the college, but under the explicit promise made by President Lee Thornton, and known of by other administrators, that Matt Matheseius, Farhad Arshad, and Cliff Wakemen would suffer no adverse employment actions. Once I tendered my resignation, this explicit basis of the bargain was violated by the CBC administration.

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[2] Mason characterizes all three faculty members as "former friends" Agar Decl., Att. 1. He states that his relationship with Mathesius is "not great," that Arshad refuses to speak to him. and that he is "friendly" but not close to Wakeman. Triesch Decl., Exh. 2, p. 49:12-23. He also admits that he has no legal relationship with any of these men. As of 2004, Mason neither had a title that allowed him to represent college faculty, nor was he contracted to engage in, or compensated for, such representation. Triesch Decl., Exh. 2, pp. 20:24-22:4.

Agar Decl., Att. A, p. 1. Mason admits that his agreement with the College makes no mention of Matheseius, Arshad, or Wakemen. Triesch Decl., Exh. 2, p. 47:1-3; *see also* Triesch Decl., Exh. 2, Dep. Exh. 1, *passim*. He also admits that his relationship with Mathesius is "not great," that Arshad refuses to speak to him, and that he is "friendly" but not close to Wakeman. Triesch Decl., Exh. 2, p. 49:12-23. Mason further admits that as of 2004, he neither had a title that allowed him to represent faculty, nor was he contracted to engage in, or compensated for, such representation. Triesch Decl., Exh. 2, pp. 20:24-22:4.

On May 3, 2007, Mason filed this lawsuit. Triesch Decl., Exh. 1. The essence of his claims is the same as those stated in his tort claim--that the College took actions toward Matheseius, Arshad, and Wakemen after Mason's voluntary resignation. *Id.*; Triesch Decl., Exh. 2, pp. 33:18-34:15. The only basis Mason offers for his belief that he can proceed on behalf of these faculty members is that he claims to have spent "years deeply involved in defending people." Triesch Decl., Exh. 2, pp. 20:24-22:4.

Mason alleges a litany of wrongs that arise out of events that are precluded by the release and waiver provisions in the agreement. On May 15, 2007, in an effort to mitigate defense-related attorney fees and costs, counsel for the College sent Mason a letter in which the College reminded him of the release and waiver covenants in the agreement. Triesch Decl., Exh. 3 (May 15, 2007 certified letter). The College also noted the lack of factual support for Mason's claims and his violation of the agreement, of RCW 4.84.185, and of CR 11. *Id.* The College requested that Mason immediately dismiss his lawsuit with prejudice. *Id.*

## IV. STATEMENT OF ISSUES

1. Whether Mason has standing to sue for damages where the College allegedly took actions toward three faculty members after his resignation.

2. Whether this lawsuit is frivolous and advanced without reasonable cause, entitling the College to an award of attorney fees and costs, pursuant to RCW 4.84.85.

3. Whether this lawsuit violates CR 11, requiring the imposition of sanctions.

## V. EVIDENCE RELIED UPON

This motion relies upon the declarations of Paul Triesch, Deborah Meadows, David Arnold, and Brian Agar, the exhibits appended thereto, and the records and files herein.

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///

## VI. AUTHORITY

### A. Standard of Summary Judgment.

Summary judgment is proper when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." CR 56 (c). Questions of fact may be determined as a matter of law when reasonable minds could reach only one conclusion. *Hartley v. State,* 103 Wn.2d 768, 775, 698 P.2d 77 (1985).

**B. Mason Lacks Standing To Pursue His Claims.**

A plaintiff has no standing to bring an action in which he is not the real party in interest. *Magart v. Fierce,* 35 Wn. App. 264, 666 P.2d 386 (1983). In order to bring a lawsuit, a plaintiff must have a personal claim against the defendant. *Sabey* F. *Howard Johnson & Co.,* 101 Wn. App. 575, 584, 5 P.3d 730 (2000); *Washington Educ. Association v. Shelton School District Number 309,* 93 Wn.2d 783, 613 P.2d 769 (1980). The doctrine of standing prohibits a litigant from raising another's legal rights. *Haberman v. Washington Public Power Supply System,* 109 Wn.2d 107, 744 P.2d 1032 (1987).

Mason bases his lawsuit on the theory that the College took action after he voluntarily resigned his employment toward three faculty members with whom Mason was previously acquainted. Agar Decl., Attachment A; Triesch Decl., Exh. I, *passim.* However, he enjoys no special relationship with any of these faculty members. Agar Decl., Att. 1 and Triesch Decl., Exh. 2, pp. 20:24-22:4; 49:12-23.

Mason claims that his separation agreement was only partially integrated, leaving unwritten terms that precluded the College from taking any action against Mathesius, Arshad, and Wakeman.[3] Triesch Decl., Exh. 2, Dep. Exh. I, pp. 33:18-40:6. Mason also claims that defendant Deborah Meadows, the Assistant Vice

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[3] The Agreement contains clear and unambiguous integration clauses that demonstrate it is the entire agreement between the parties. Triesch Decl., Exh. 2, Dep. Exh. 1, pp. 1, 5-6, and 8.

President for Instruction, disparaged him to Professor David Arnold. *Id.* Neither of these claims has legal or factual merit.

First, the Agreement unambiguously states that it is the entire agreement between the parties. Triesch Decl., Exh. 2, Dep. Exh. I, pp. 1, 5-6, 8, and *passim*. It is a fully integrated agreement. Mason acknowledges those integrations clauses. Triesch Decl., Exh. 2, pp. 22:21-32:13. Second, Mason presents no admissible evidence to support a claim that Dean Meadows disparaged him to Professor Arnold. He offers no admissible evidence of what the alleged disparagement entailed, except that Dean Meadows allegedly suggested to Professor Arnold that the College, rather than Mason, instigated his departure. Both Dean Meadows and Professor Arnold deny that Dean Meadows made any disparaging comments about Mason whatsoever. Meadows Decl.; Arnold Decl. Mason offers no admissible evidence to the contrary.

Therefore, not only does Mason lack standing to allege a claim regarding actions the College allegedly took toward Mathesius, Arshad, and Wakeman, he lacks evidence to support his theory regarding Dean Meadows. His claims must be dismissed.

### C. This Lawsuit Violates Mason's Agreement With The College.

The court's primary goal in interpretation an agreement is to ascertain the parties' intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005); *Berg v. Hudesman,* 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990). When deciding intent, the court must focus on the objective

manifestation of the parties in the written contract, rather than the unexpressed subjective intent of either party. *Id.*

Settlement agreements are contracts and general principles of contract Jaw govern their construction. *Morris* v. *Maks,* 69 Wn.App. 865, 868, 850 P.2d 1357, *review denied,* 122 Wn.2d 1020 (1993); *Stottlemyre v. Reed,* 35 Wn.App. 169, 171, 665 P.2d 1383, *review denied.* 100 Wn.2d 1015 (1983). When a contract is unambiguous, courts must enforce its terms according to their plain meaning. *Syrovy v. Alpine Res., Inc.,* 122 Wn.2d 544, 551, 859 P.2d 51 (1993). Parole or extrinsic evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract in the absence of fraud, accident, or mistake. *Lynott v. Nat'l Union Fire Ins. Co.,* 123 Wn.2d 678, 683, 871 P.2d 146 (l994) (quoting *Berg v. Hudesman,* 115 Wn.2d 657, 669, 801 P.2d 222 (1990)).

Here, the agreement unambiguously precludes Mason's claims. Further, Mason supplies no admissible evidence to support his claim regarding Dean Meadows. Mason was aware before filing his tort claim and this lawsuit that the agreement bore unambiguous integration clauses, and that he had no facts to support his claims. *See* Triesch Decl., Exh. 2, pp. 23:10-24:8-21, 25:2-22, 27:16-28:15, 35:5-37:22. He breached the agreement by commencing this lawsuit, triggering the remedies under RCW 4.84.185 and CR 11.

**D. This Lawsuit Violates RCW 4.84.185 and CR 11.**

**1. Attorney Fees and Costs, Pursuant to R.C.W. 4.84.185.**

R.C.W. 4.84.185 provides, in relevant part:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action...was frivolous and advanced without reasonable cause, require the non-prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action... The judge shall consider all evidence presented at the time of the motion to determine whether the position of the non-prevailing party was frivolous and advanced without reasonable cause.

An action is frivolous if it cannot be supported by any rational argument on the law or facts. *Daubner v. Mills,* 61 Wn.App. 678, 684, 811 P.2d 981 (1991); *Forster v. Pierce County,* 99 Wn.App. 168, 183, 991 P.2d 687, *review denied,* 141 Wn.2d 1010 (2000).

Here, Mason has no basis for alleging theories that are unambiguously precluded by the agreement or for claiming wrongs by Dean Meadows that he has no evidence to support. The College has incurred damages in the form of attorney fees and costs in the defense of this action. Those expenses should be awarded against Mason, pursuant to RCW 4.84.185.

The decision to award attorney fees as a sanction for a frivolous action is left to the discretion of the trial

court, and that decision will not be disturbed absent a showing of abuse of discretion. *Lockhart v. Greive,* 66 Wn.App. 735, 744, 834 P.2d 64 (1992); *Fluke Capital & Mgt. Sen's. Co. v. Richmond.* 106 Wn.2d 614, 625, 724 P.2d 356 (1986); *Clarke v. Equinox Holdings. Ltd.,* 56 Wn.App. 125, 132, 783 P .2d 82, *review denied.* 113 Wash.2d 1001 (1989). Here, the record supports the award of fees and costs. Mason has no factual or legal support for his claims. The court should award the College its attorney fees and costs.

**2. Sanctions, pursuant to CR 11, Rule for Superior Court.**

CR 11 is concerned with two types of filings: (1) those that are not well grounded in fact and warranted in law, and (2) those made for any improper purpose. *Madden v. Foley, 83* Wash.App. 385, 389, 922 P.2d 1364 (1996). Mason's claims are neither supported by facts nor warranted in law. He has not presented any admissible evidence of an injury caused to him by the College, he unambiguously waived any right to sue the College for events related to his former employment, and he alleges conduct by Dean Meadows for which he has no admissible evidence. It is difficult to imagine a clearer violation of CR 11.

CR 11 imposes an objective standard of reasonableness. *Miller v. Badgley,* 51 Wn. App. 285, 753 P.2d 530 (1988). For Mason's claims to be well-grounded for the purposes of CR 11, he must be able to identify some injury he suffered that was proximately caused by the College. *Doe v. Spokane & Inland Empire Blood Bank,* 55 Wn. App. 106, 780 P.2d 853 (1989) (negligence). He has not done so. Where a complaint is not well-grounded in fact, the court

abuses its discretion by denying sanctions for the filing of the complaint. *Suarez v. Newquist,* 70 Wn. App. 827, 855 P.2d 1200 (1993).

Further, Mason lacks standing to bring claims on behalf of faculty members with whom he has no legal or factual relationship. Attorney fees are proper under CR 11 where a party lacks standing to litigate a matter. *State ex rel. Quick-Ruben v. Verharen,* 136 Wn.2d 888, 969 P.2d 64 (1998). Again, it is difficult to imagine a clearer violation of the Rule.

## VII. CONCLUSION

There is no legal or factual basis for this complaint The court should dismiss it and award the College's attorney fees and costs, pursuant to RCW 4.84.185. The court should also impose sanctions, because commenced this action and wasted judicial resources for improper purposes.

DATED this 12th day of March, 2008.

ROBERT M. MCKENNA
Attorney General

/s/Paul Triesch
PAUL TRIESCH, WSBA #17445
Assistant Attorney General
Attorney for Defendants

## APPENDIX J

## COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

**Court of Appeals Number 273229**

**[Filed November 26, 2008]**

| | |
|---|---|
| Craig Mason, | ) |
| **Appellant,** | ) |
| vs. | ) |
| Columbia Basin College, Columbia Basin Board of Trustees, Lee Thornton, Rich Cummins, Meg Woods, and the marital community of Meg Woods and Rich Cummins, David Shaw and the marital community of David Shaw and Jane Doe Shaw, Deborah Meadows and the marital community of Deborah Meadows and Mike Grinnell, Ruben Lemos and the marital community of Ruben Lemos and Jane Doe Lemos, and Bill McKay and the marital community of Bill McKay and Jane Doe McKay, | ) |
| **Respondents** | ) |

**BRIEF OF APPELLANT: CRAIG MASON**

Craig Mason, Appellant
Attorney Pro Se
N. 3007 Cincinnati
Spokane, WA, 99207
WSBA# 32962

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2 2. Assignment of Error 2. The court erred on June 20, 2008, in denying Plaintiff Craig Mason's CR 56(f) request for more time for discovery to meet Defendants' Motion for Summary Judgment.

3 3. Assignment of Error 3. The court erred on June 20, 2008 in granting Defendants' request for sanctions under RCW 4.84.185.

3 4. Assignment of Error 4. The court erred on June 20, 2008 in granting, in part, Defendants' motion to strike portions of Plaintiff's affidavits.

3 **B. Issues Pertaining to Assignments of Error**

3 1. Did the court apply the proper summary judgment standard, which requires the court to construe the facts against the moving party, when the court instead supplied its own factual interpretation, and construed facts in favor of the moving party? (Assignment of Error 1.)

3 2. Should the court have applied the "context rule" of contract interpretation, which requires that all factors surrounding the agreement be considered, and which requires that such contextual facts be found by the jury? (Assignment of Error 1.)

3 3. Should the court have ignored the post-signing period of revocation of the agreement at issue, a 10 day period during which the Plaintiff offered fresh consideration for additional promises in guarantee of the contract at issue? (Assignment of Error 1.)

3 4. Should the court have construed the boilerplate language of the contract at factual issue to not only recompense past wrongs, but to license Defendants to commit future wrongs against the Plaintiff, and should the court have construed the agreement to waive all of Plaintiff's future legal actions against all future wrongs committed by the Defendants against the Plaintiff? (Assignment of Error 1.)

4 5. Should the court, having interpreted the waiver provisions of the agreement at issue to waive all future legal action, have dismissed all non-contract causes of action? (Assignment of Error 1.)

4 6. Did the court err on June 20, 2008, in denying Plaintiff's CR 56(f) request for more time for discovery to meet Defendants' Motion for Summary Judgment, as the record clearly showed the reasons for the discovery schedule? (Assignment of Error 2.)

4 7. Did the court err on June 20, 2008 in denying Plaintiff's CR 56(f) motion, as the legal standard for granting more time under CR 56(f) had been met? (Assignment of Error 2.)

4 8. Did the court fail to apply the proper legal standard in granting Defendants' request for sanctions under RCW 4.84.185? (Assignment of Error 3.)

4 9. Did the court fail to properly find specific facts to support a finding under RCW 4.84.185 that Mr. Mason's claims were entirely without rational basis in law or fact? (Assignment of Error 3.)

4 10. Did the court err on June 20, 2008 in granting, in part, Defendants' motion to strike portions of Plaintiff's affidavits, as the stricken material was only offered to prove the actions directly witnessed by the declarants? (Assignment of Error 4.)

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## I. Standard of Review

### A. De Novo Standard of Review

On appeal, the appellate court stands in the same position as the trial court, and determines for itself whether there are genuine issues of material fact. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006).

### B. Dismissal on Summary Judgment Improper If There are Genuine Issues of Material Fact

If there are genuine issues of material fact, then the case should be allowed to proceed, and dismissal on summary judgment is erroneous. "If reasonable minds can reach different conclusions, summary judgment is improper." *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 30, 959 P.2d 1104 (1998) (citing *Kalmas v. Wagner*, 133 Wn.2d 210, 215, 943 P.2d 1369 (1997)).

The court should have construed the facts in favor of Mr. Mason, and against Columbia Basin College. "When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party...." *Ranger Insurance v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008) (emphasis added) (upholding reversal of summary judgment).

"A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation," *Id., citing*, *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 618 P.2d 96

(1980), *cited in Bort v. Parker*, 110 Wn. App. 561, 569, 42 P.3d 980 (2002).

### C. Burden of Proof and Persuasion

The burden is on the Defendant College (CBC) as the moving party. *Ranger Insurance v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). If the Defendant CBC meets its burden, then the burden shifts back to Mr. Mason to provide facts, not merely speculation and argument that genuine issues of material fact exist. *Id., citations omitted.*

## II. Assignments of Error and Issues Related to the Assignment of Error

### A. Assignments of Error

1. Assignment of Error 1. The trial court erred on June 20, 2008 in reversing its own preliminary decision that genuine issues of material facts existed, and then in construing the facts in favor of the Defendants' motion, and ordering Mr. Mason's case dismissed on summary judgment.

2. Assignment of Error 2. The trial court erred on June 20, 2008, in denying Plaintiff Craig Mason's CR 56(f) request for more time for discovery to meet Defendants' Motion for Summary Judgment.

3. Assignment of Error 3. The trial court erred on June 20, 2008 in granting Defendants' request for sanctions under RCW 4.84.185.

4. Assignment of Error 4. The trial court erred on June 20, 2008 in granting, in part, Defendants' motion to strike portions of Plaintiff's affidavits.

**B. Issues Pertaining to Assignments of Error**

1. Did the trial court apply the proper summary judgment standard, which requires the court to construe the facts against the moving party, when the court construed facts in favor of the moving party? (Assignment of Error 1.)

2. Should the trial court have applied the "Context Rule" of contract interpretation, which requires that all factors surrounding the agreement be considered, and which requires that such contextual facts be determined by the jury? (Assignment of Error 1.)

3. Should the trial court have ignored the post-signing period of revocation of the agreement at issue, a 10 day period during which the Plaintiff offered fresh consideration for additional Defendant promises in guarantee of the contract at issue? (Assignment of Error 1.)

4. Should the trial court have construed the boilerplate language of the contract at factual issue to not only recompense past wrongs in settlement, but to license Defendants to commit future wrongs against the Plaintiff, and should the trial court have construed the agreement to waive all of Plaintiff's future legal actions against all future wrongs committed by the Defendants against the Plaintiff? (Assignment of Error 1.)

5. Should the trial court, having interpreted the waiver provisions of the agreement at issue to waive all future legal action, have dismissed all non-contract causes of action? (Assignment of Error 1.)

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7. Did the trial court err on June 20, 2008 in denying Plaintiff's CR 56(f) motion, as the legal standard for granting more time under CR 56(f) had been met? (Assignment of Error 2.)

8. Did the trial court fail to apply the proper legal standard in granting Defendants' request for sanctions under RCW 4.84.185? (Assignment of Error 3.)

9. Did the trial court fail to properly find specific facts to support a finding under RCW 4.84.185 that Mr. Mason's claims were entirely without rational basis in law or fact? (Assignment of Error 3.)

10. Did the trial court err on June 20, 2008 in granting, in part, Defendants' motion to strike portions of Plaintiff's affidavits, as the stricken material was only offered to prove the actions directly witnessed by the declarants? (Assignment of Error 4.)

## II. Statement of the Case

### A. Statement of Facts

#### 1. Special Relationship between Mr. Craig Mason and CBC President, Lee Thornton.

Plaintiff, Craig Mason, had long-served in multiple roles at Columbia Basin College, since he began teaching there in 1988. *CP: 454.* These roles were teacher, faculty union leader, and administrative participant. *CP: 484-85, 491.* In 1992 Mr. Mason began an ultimately successful defense of English teacher Dave Abbott against false sexual harassment allegations. *CP: 455.* The aftermath of this defense of Dave Abbott led to the firing of CBC President Marv Weiss, and animated the carry-over CBC administrators into a variety of torts against Mr. Mason, which continued until filing of this lawsuit. *CP: 457.* Mr. Mason endured these mistreatments as he focused on positively bettering CBC. *CP: 403-07, 455, 458.* After the firing of Marv Weiss, Mr. Mason worked happily for nine months with the interim president, Carl Opegaard, on administrative activities and in labor relations. *CP: 457.* Subsequently, Mr. Mason felt obliged to serve on the hiring committee that chose the next CBC president, Lee Thornton; and Mr. Mason worked hard to help Lee Thornton try to become a successful president. *Id.*

After the arrival of Lee Thorton as President of CBC in April of 1995, Lee Thornton cultivated a special relationship with Mr. Mason, frequently requesting his assistance with difficult contract issues, legal issues, and special projects (including accreditation and assessment projects). *Id.* Fearing

that Lee Thornton was becoming too dependent upon him, Mr. Mason left CBC after a year of helping Lee Thornton, to teach for a year at Eastern Washington University, as a Visiting Professor of Government, in the fall of 1996. *CP: 456.* Due to his success as a professor and colleague, EWU offered Mr. Mason immediate tenure to remain beyond the 1996-97 academic year. *Id.*

But, drawing upon their special relationship, Lee Thornton asked Mr. Mason to return to CBC, and to further encourage Mr. Mason to return to CBC, Thornton created a position at CBC for Mr. Mason's wife to teach accounting. *Id.*

Mr. Mason returned to CBC in the fall of 1997 to assist Lee Thornton in the management of CBC. While Mr. Mason worked with President Lee Thornton, spear-heading a variety of projects at Mr. Thornton's request, the holdover middle managers ceaselessly sought to undermine Mr. Mason. *Id.*

The Governance Self-Study for Accreditation, the Assessment Projects undertaken by Mr. Mason at Lee Thornton's request, and other large and controversial projects were all onerous tasks undertaken by Mr. Mason because of a relationship of "confidence and trust" with Lee Thornton. *CP:459.* Even Mr. Mason's subsequent departure from CBC was undertaken as an act of friendship. *CP: 403-07, esp. 407 ( Mason Dec. in Opp., Exhibit D, Mr. Mason's Letter of Retirement from CBC) and CP: 254-57 (Addendum D to First Declaration of Matt Mathesius -- Mason Letter to Lee Thornton and Rich Cummins, 6/19/03).*

Mr. Mason continued to ignore the tortious actions of CBC managers for the good of the College. *CP: 462.* Unfortunately, Lee Thornton's unwillingness to control these managers meant that, ultimately, Lee Thornton allowed CBC to suffer too much corruption (e.g., of the transcript), and too much erosion of legality, for Mr. Mason to ethically endure. *CP: 463, and see CP: 258-68: Addendum D of Matt Mathesius, documenting why the English Exit Exam should have been investigated in 2003.* Additionally, given Thornton's complete loss of ethics, the years of intense personal attacks were no longer worth tolerating, and hence Mr. Mason prepared to leave CBC. *Id.*

Ethically, Mr. Mason could no longer remain at CBC without having to gather the facts, and to initiate the processes, to fire Lee Thornton for the corruption Thornton had come to tolerate. *Id. and CP: 403-07.* Therefore, Mr. Mason chose to leave, as long as his three friends and colleagues currently under threat of administrative attacks would be safe in their employment status. These three colleagues were then, in 2003, under the typical character assassination assaults on their reputations, by CBC administrators, which was the standard first step in these CBC managers' stereotypically preparatory to attempts to wrongfully fire faculty. *CP: 464, 237.*

Mr. Mason procured promises from Lee Thornton that faculty members Farhad Arshad, Matt Mathesius, and Cliff Wakeman would be safe from any negative changes in work conditions. *CP: 457, and see 237.* Having received this necessary assurance, Mr. Mason negotiated his departure from CBC in deference to, and in reliance upon, this special relationship with Lee Thornton. *CP: 466.*

**2. Special Relationship with Rich Cummins, then VP, now President, of CBC.**

Rich Cummins had been advanced by Mr. Mason to Lee Thornton as a likely vice-president, and had been a friend of Craig Mason's. *CP: 460.* However, in early 2003, when academic standards were under substantive and procedural attack in the CBC English Department, Rich Cummins decided to cover-up the problems at the request of Lee Thornton. Rich Cummins cultivated the morally weak side of Lee Thornton that had sustained CBC's managerial problems. *CP: 461.*

A cheating scandal appeared in the English exit examinations, also in early 2003, which led President Lee Thornton to guarantee Rich Cummins a community college presidency in exchange for Rich Cummins covering up the cheating scandal on the English exit exams. *CP: 461.* Instead of carefully investigating the good evidence of cheating, Rich covered up this attack on that which must sustain the highest integrity of a college – the college transcript. *Id.*

As a result of this shocking absorption of another former friend into CBC's corrupt managerial culture, Mr. Mason felt an additional ethical compulsion to leave CBC, or else he would have to fight to fire both of his former friends (Thornton and Cummins). *CP: 463.*

**3. The Partially Integrated Agreement**

Seeking a personally and professionally ethical way out of this wrenching dilemma, another piece of the ethical puzzle was that Mr. Mason had to use

enormous amounts of energy to protect faculty, as the Association of Higher Education "Uniserv Reps" had failed to protect faculty. *CP: 463.* Lee Thorton would not fire corrupt administrators that he had inherited from Weiss, and so ethics required Mr. Mason to assure the employment safety of the faculty currently under attack. *CP: 463.* Without this assurance, Mr. Mason would not have left CBC. *CP: 465.*

It was an absolute ethical prerequisite for Mr. Mason that he procure CBC's substantively sincere promise that faculty members Farhad Arshad, Matt Mathesius, and Cliff Wakeman would not be harmed in any way in their work conditions by Mr. Mason's departure. *CP: 465.* This was an absolute necessity "but for which" Mr. Mason would not have left CBC, and Lee Thornton and Rich Cummins were continually informed of this. *CP: 466.*

While negotiating Mr. Mason's departure, Lee Thornton again and again made the promise of the career safety of these three faculty members to Mr. Mason, knowing that "but for" this promise: (a) Mr. Mason would not leave CBC, and (b) Mr. Mason would have revoked his agreement to leave CBC during the period of revocation of the agreement. *CP: 465-66, 474 (Complaint) & CP: 321( Mason Dec. in Opp) & CP: 297-98 (First Declaration of Lori Mason).*

Plaintiff, Craig Mason, had a special relationship with Lee Thornton, and with Rich Cummins. *CP: 302.* Mr. Mason also had a special relationship with Matt Mathesius and Farhad Arshad in that they relied upon him to defend them from a pattern of illegal and abusive actions by the Columbia Basin College (CBC) administration, and because of these collegial special

relationships, Mr. Mason could not ethically leave CBC without assuring the job safety of Mr. Mathesius and Mr. Arshad. *CP: 302, 235-38.* Further, Cliff Wakeman was also a source of ethical concern, given that he had uncovered the cheating scandal, and Mr. Mason specifically bargained for Mr. Wakeman's good treatment, additionally, before departing CBC. *CP: 302, 321, 297-98, 465-66, 474.*

The written portion of the total agreement was, at every moment of its negotiation, intended by both parties to be a partial integration of their total agreement. *CP: 302, 436-440 (Plaintiff's Admissions).* Both parties, the College and Mr. Mason, understood that the written document was a partial integration. *CP: 318-331(Mason Dec. in Opp.), and CP: 436-440.*

Mr. Mason was in an ethical dilemma, forcing upon him a choice of lesser evils. *Id.* If the CBC administration had not promised that there would be no negative employment actions of any kind against Mr. Mathesius and Mr. Arshad, Mr. Mason would have instead chosen the lesser evil of remaining at CBC, at which point Mr. Mason would have been compelled to fight Lee Thornton and Rich Cummins, especially regarding their failure to support the tenure process, and, most importantly, their failure to investigate the cheating scandal in the English department exit exams, as well as other ongoing violations of due process, employment law, and academic freedom. *CP: 318-331.*

After learning of the English Exit exam cover-up, in early 2003, Mr. Mason filed a tort claim, which omitted some of the most damning facts about CBC's torts against him, still trying to protect CBC. *CP: 321.* Mr.

Mason's purposes were: (a) to try to shake Lee Thornton back to his ethical roots and (b) to set the legal context for negotiating his departure from CBC if Lee Thornton remained willing to corrupt the CBC transcript. *CP: 321.* The Attorney General refused to settle the tort claim, and thus CBC did not have formal legal authority to settle Mr. Mason's tort claim. *CP: 437.*

The egregious torts committed within the three years prior to the tort claim have still not been divulged, and this confidentiality aspect of the partially integrated agreement at issue has been fulfilled by Mr. Mason, despite breaches of the agreement by CBC. *(CBC has not suggested that Mr. Mason divulged the pre-November, 2003, torts.)*

The total agreement – the writing plus oral promises to protect Mathesius, Arshad, and Wakeman -- were issues involving a full "meeting of the minds." *CP: 436 440.* At no point in those negotiations was a license for CBC to commit future torts in the contemplation of the parties. *(Cannot cite to non-existent "facts.")* Such a waiver against CBC committing future torts against Mr. Mason was never mentioned, nor contemplated. *Id.* Additional oral assurances were given Mr. Mason that his departure would not be misrepresented to his detriment, to the extent it was not confidential. *CP: 436-440 and 73-74.* But, never was a license to commit future torts granted to CBC, or anyone else. *CP: 46 (Motion to Reconsider, p.9).*

In late October of 2003, CBC and Mr. Mason entered into a "purchase of tenure" that both parties knew was a de facto settlement agreement. *CP: 436-*

*440, esp. 437, 465.* The written portion of the total agreement was a partial integration from the outset. *CP: 436-440, 465.* The CBC administration was negotiating "around" the tort claims process. *CP: 436-440.*

Mr. Mason left those legalities, about getting around the tort claims process, to CBC and its Attorney General, Kevin Hartze, while Mr. Mason focused on procuring and assuring the employment conditions safety of Mr. Wakeman, Mr. Mathesius, and Mr. Arshad. *CP: 465, 235-38, 440.*

Mr. Mason withdrew his tort claim and tendered his "sale of tenure" resignation, as his consideration for the partially integrated agreement. *CP: 436-440, 301, 303-06, 310.* CBC promised the financial consideration and the career safety of Wakeman, Mathesius, and Arshad as crucial consideration, "but for" the promise regarding these three CBC faculty members there would have been no agreement. *Id.*

Additional guarantees were made in the week after Mr. Mason signed the agreement, during Mr. Mason's period of revocation. *Id.* Mr. Mason offered CBC the consideration that he would not exercise his right to revoke the agreement, and Lee Thornton as President of CBC, personally swore additional protections for the faculty at issue, such that no one at CBC would be allowed to erode the employment conditions or security of Cliff Wakeman, Matt Mathesius, or Farhad Arshad in any way. *Id.*

**4. The Breach of This Agreement, and Other Torts**

In breach of this understanding, Mr. Mathesius and Mr. Arshad were immediately and severely attacked by the CBC administration, and threatened with loss of their jobs. *CP: 233-238, 249-53, 254-57, 271-294, 403-07, 337-400.* Cliff Wakeman also suffered negative employment repercussions. Other acts by CBC's administration were also taken in overt contradiction to the total agreement. *Id.*

These violations of the agreement were undertaken to deliberately distress Mr. Mason, and these violations were part of the ongoing attacks upon Mr. Mason's reputation. *Id. and CP: 74.*

**5. Partially Integrated Agreement: Objective Meeting of the Minds**

The written portion of the agreement which Defendants now raise to try to bar suit was always understood, by both parties, to be a partial integration, and it was negotiated between persons with special relationships, and for specific third-party beneficiaries, who also had special relationships with Mr. Mason, and with the knowledge that damage to the third-party beneficiaries would also cause Mr. Mason moral and psychological anguish. *CP: 436-440, 465.* "But for" the understanding, created by CBC, and sustained by CBC, that the agreement was a partial integration, Mr. Mason would not have signed the agreement. The total agreement – written and oral terms – was that to which Mr. Mason agreed. *CP: 436-440, 465.*

"But for" Lee Thornton assuring Mr. Mason of the terms of the agreement -- specifically including the safety of Mr. Mathesius, Mr. Arshad and Mr. Wakeman, assurances repeated and strengthened during the period of revocation after both parties signed the agreement -- Mr. Mason would have revoked the agreement during the period of revocation. Mr. Mason had begun to worry that fraud was intended by CBC. *CP: 436-440, 465.* Lee Thornton drew upon his special relationship with Mr. Mason to induce Mr. Mason's reliance upon Thornton's reassurances. *Id. and CP: 403-07.*

Each step of the way, Lee Thornton, as the agent of CBC, and as a person with a special relationship with Craig Mason, assured Mr. Mason (a) that the agreement was a partial integration and (b) that Mr. Mathesius, Mr. Arshad, and Mr. Wakeman were specifically protected by the agreement. *CP: 297-98, 321, 436-440, 465-66, 474.*

The "writing" was presented to Mr. Mason as an insignificant formality (a) to induce his signing that written agreement, and (b) to induce him to agree to the real total agreement at issue, which included the crucial terms defending his colleagues. *Id.*

These facts are at the heart of the application of the "Context Rule" of Washington State's common law of contract interpretation. *CP: 612-13.* The "Context Rule" sets the total context of an agreement before a jury; and it is for the jury to find interpretive facts surrounding the waiver of liability, written in the partially integrated agreement, and now raised by the Defendant CBC as a defense to this suit by Mr. Mason. *CP: 436-440, 623-27.*

## B. Statement of Trial Court Procedure

### 1. Brief Overview of June 20, 2008 Proceeding

The Defendants' Motion for Summary Judgment came before the trial court on June 20, 2008, at which was also heard the Plaintiff Craig Mason's CR 56(f) Motion requesting more time, and the Defendants' Motion to Strike. The Defendants' Motion to Strike Evidence was granted, in part, regarding some hearsay, and the "Farhad Arshad Packet"; the Plaintiff Mason's CR 56(f) Motion was denied, and the Defendant College's Motion for Summary Judgment was granted on the basis of the trial court's construction of the release and waiver provisions of the partially integrated contract at issue. The trial court denied the Defendants' CR 11 request for sanctions, and granted, without specific findings, the Defendants' request for RCW 4.84.185 recovery of costs and attorneys fees. Motions for reconsideration were denied, and this appeal timely followed. (See Point 2, below, for citation to Clerk's Papers.)

### 2. Summary of June 20, 2008 Hearing, Clerk's Papers 591-655

Judge Bill Acey determined that he would hear Mr. Mason's CR 56(f) Motion for Continuance, then CBC's Motion to Strike, and then CBC's CR 56 Motion for Summary Judgment. *CP: 593.* Mr. Mason presented that the contract at issue was a "partial integration" that manifested a "clear meeting of the minds." *Id.* Mr. Mason drew the court's attention to his allegation of a second agreement, made during the period of revocation, that would have been post-signing, and outside the written partial integration. *CP: 594.* Mr.

Mason argued that he already had sufficient affidavits and exhibits to show genuine issues of material fact, but he requested more time to further strengthen his case. *Id.*

Next, Mr. Mason reminded the court that there was also a fraud action against CBC specifically pled, and offered the affidavits of Matt Mathesius, Cliff Wakeman, and Farhad Arshad to show the cheating scandal whose cover-up motivated the administration of CBC to make the fraudulent guarantees to Mr. Mason. *CP: 594.* And Mr. Mason reminded the court that the torts of negligent and intentional infliction of emotional distress were also pled. *CP: 595.* The harm against third party beneficiaries had also been pled, and Mr. Mason requested more time to pursue additional affidavits on those matters. *Id.* Mr. Mason requested that the normal discovery cut-off in the case scheduling order be respected, and that more time be allowed him under CR 56(f). *CP: 595-96.*

Next, CBC argued that there had been no good reason for the delay in discovery. (*CP: 596-600*) Mr. Mason responded that the record was clear that Mr. Mason had been teaching on the Colville Indian Reservation, and could not resume discovery until the summer of 2008, and that CBC's counsel, Paul Triesch, had stipulated to a new trial schedule with that knowledge. *CP: 600.* Mr. Mason also noted that he had to allocate what little spare time he had that academic year to handle a large trial during the school year. *CP: 601.*

The trial court denied Mr. Mason's CR 56(f) Motion. *CP: 602.*

Turning to CBC's Motion to Strike, the precise ruling was not entirely clear, since the heart of the matter will be in the particular application of the court's general ruling. *See CP: 602-11.* The significant exclusion was Exhibit B to the Declaration of Craig Mason, the "Farhad Arshad Packet." *CP: 603.* This Exhibit was not offered to prove the truth of every document in it, but to provide support for Craig Mason directly witnessing the drafting of most of the packet, witnessing its entire compilation, and witnessing its distribution to Tri-City attorneys, which culminated in Farhad Arshad filing Federal suit against CBC. *Declaration of Craig Mason, CP: 318-331, at 324.* The court struck Exhibit B. *CP: 604.*

Turning to CBC's Motion for Summary Judgment, counsel for CBC, Paul Triesch, declined to present oral argument in detail, and deferred to his pleadings. *CP: 611-612.*

Mr. Mason then presented the case law of *T.R.A. v. Flowers*, 127 Wn.App. 13, 111 P.3d 1192 (2005) and provided courtesy copies. *CP: 612-613.* Mr. Mason then noted that "it's well established in Washington law that oral contracts – even oral contracts that modify or contradict written partial integrations, especially boilerplate language in the partial integrations...raise questions of fact." *CP: 613.*

Further, Mr. Mason made clear that "but for" the oral terms, he would have never agreed to the contract. *CP: 613-14.* Both sides knew that the written document was a partial integration. *CP: 614.* Mr. Mason presented, based upon filed affidavits, that the writing at issue was always understood to be a partial integration, and that there was a "meeting of the

minds" to this effect, and as to the terms of the agreement. *CP: 614.*

Mr. Mason noted that under the common law of Washington the "total agreement is an issue of fact." *Id.* Mr. Mason noted that affidavits creating the issue of fact on this account had been submitted to the court. *Id.* These points of law were repeated clearly. *CP: 615.*

In reply, Mr. Triesch, for CBC, construed the facts in favor of the moving party and argued that the agreement was a total integration. *CP: 616-17.*

The court then asked Mr. Triesch to distinguish *T.R.A. v. Flowers*. *CP: 617.*

A discussion of *T.R.A. v. Flowers* commenced between all present. *CP: 617-623.*

The court then told Mr. Mason he did not need to argue any further, that Mr. Mason had won, and that CBC's summary judgment motion would be denied. *CP: 623.*

Mr. Triesch then again construed the facts in favor of CBC, the moving party, arguing that the writing was a total, not partial, integration. *CP: 623-627.*

Discussion of *T.R.A. v. Flowers* resumed. *CP: 628-630.* The court then indicated that it had wanted to grant CBC's summary judgment motion at the outset of the proceeding, or sooner. *CP: 630.* The court then decided to allow supplemental briefing. *Id.*

Mr. Triesch then construed Mr. Mason's suit as one in tort, and argued that *T.R.A. v. Flowers*, as a

contract case, offered Mr. Mason no relief regarding torts, since tort actions were prohibited by the partial integration at issue. *CP: 631-33.*

Mr. Mason then summarized his reliance upon the Context Rule of Washington law in entering into the agreement at issue. Without the case law of *Berg v. Hudesman,* and its progeny, reaffirming that boilerplate could not thwart real agreements, and without the Washington common law thus protecting him from being defrauded, Mr. Mason would not have entered into the partially integrated agreement with CBC. *CP: 633-635.*

The trial court then undertook, on its own, to distinguish *T.R.A. v. Flowers*, construing facts and law against Mr. Mason, and announced it would be ruling in favor of CBC on summary judgment. *CP: 635-638.*

Mr. Mason then reminded the court that there was a real factual dispute that the writing was never a total integration. *CP: 639.* Mr. Mason reminded the court that the parol evidence rule does not apply to subsequent agreements (e.g., the agreements made during the period of revocation, supra), and again addressed the "Context Rule." *CP: 639 & 640.*

Mr. Mason reviewed the law of third party beneficiaries and the law of fraudulent inducement. *CP: 640.* As to credibility, Mr. Mason reminded the court that credibility is a jury question. *CP: 641.*

Concluding its summary judgment ruling, the court, having construed the facts in favor of the moving party, and holding that the agreement at issue was a total integration, the court then construed the

waiver provision to mean: "You promised to never sue him [Lee Thornton] again." *CP: 642.* This was apparently used as the basis to dismiss all other torts and contract claims, and to impose sanctions against Mr. Mason. *CP: 644.*

Mr. Mason then noted to the court, that even if the boilerplate of the partial integration was construed to be a complete integration, that "certainly no such language could be a license for future wrongs." *CP: 644.* Mr. Mason concluded the record by restating that under Washington common law, he had created genuine issues of material fact. *CP: 645.*

A finding to support costs and fees under RCW 4.84.185 was later made, stating about Mr. Mason: "He promised not to sue, he did, he wasn't supposed to, it was an entire agreement. It was frivolous. It should have never been brought." *CP: 654.* No other finding was made. Sanctions under RCW 4.84.185 were imposed based upon this finding. *Id.*

The Defendants' presentment of a cost bill was set by court order for December 12, 2008. *CP: 576 (August 4, 2008 Order).* But it was apparently held on September 12, 2008, without notice to Mr. Mason. *CP: 671-73 and 573.* By that date, this appeal was underway.

## III. Summary of the Argument

The trial court erroneously construed the facts in favor of the moving party, failed to apply the Context Rule of contract interpretation, improperly gave Defendants a license to commit future torts, and did not, and could not, properly find facts to justify

sanctions under RCW 4.84.185. Other errors will be detailed, below.

## IV. Legal Argument

**A. Issue 1:** Did the trial court apply the proper summary judgment standard, which requires the court to construe the facts against the moving party, when the court instead supplied its own factual interpretation, and construed facts in favor of the moving party? (Assignment of Error 1.)

**Answer: No, the trial court did not apply the proper standard of summary judgment; it did not construe the facts against the moving party, and it substituted its judgment for that of the jury.**

### 1. De Novo Review

For purposes of answering this question, the appellate court stands in the same position as the trial court, and determines for itself whether there are genuine issues of material fact. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006).

### 2. Standard of Review

The standard of review of summary judgment is de novo. The appellate court stands in the same place as the trial court. All facts are to be construed against the moving party, and the moving party has the burden of showing that no reasonable jury could possibly decide in favor of the non-moving party. *Ranger Insurance v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

If there are genuine issues of material fact, then the case should be allowed to proceed, and dismissal on summary judgment is erroneous. "If reasonable minds can reach different conclusions, summary judgment is improper." *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 30, 959 P.2d 1104 (1998) (citing *Kalmas v. Wagner*, 133 Wn.2d 210, 215, 943 P.2d 1369 (1997)).

The court should have construed the facts in favor of Mr. Mason, and against Columbia Basin College. "When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party...." *Ranger Insurance v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008) (emphasis added) (upholding reversal of summary judgment).

"A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation," *Id., citing*, *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 618 P.2d 96 (1980), *cited in Bort v. Parker*, 110 Wn. App. 561, 569, 42 P.3d 980 (2002).

In addition to the cases cited above, it is crucial to recall that on summary judgment the court is **not** to make credibility determinations, or weight of the evidence determinations, in place of the jury. It is not the function of the trial court to weigh the evidence to be considered and construed by the jury. Summary judgment must be denied if a right of recovery is indicated under any provable set of facts. *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964).

Had the trial court construed the facts in favor of Mr. Mason, then the "sale of tenure" agreement would have been properly seen as a partial integration of the Total Agreement that included oral terms. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995) (All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party).

**Application:** The Plaintiff, Mr. Mason, has provable rights of recovery under the submitted facts in this case, and the trial court erroneously construed facts against Mr. Mason, and the trial court made its own credibility and weight of the evidence determinations. Dismissal on summary judgment was erroneous.

**3. Burden of Proof and Persuasion:** The burden is on the Defendant College (CBC) as the moving party. *Ranger Insurance v. Pierce County,* 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Summary judgment must be denied if a right of recovery is indicated under any provable set of facts. *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964).

If the Defendant CBC meets its burden, then the burden shifts back to Mr. Mason to provide facts, not merely speculation and argument, that genuine issues of material fact exist. *Ranger Insurance v. Pierce County,* 164 Wn.2d 545, 552, 192 P.3d 886 (2008), *citations omitted*.

**Application:** CBC only brought forward facts supporting the written waiver against Mr. Mason filing suit as a total integration. Mr. Mason rebutted these facts, with sufficient allegations to invoke the "Context Rule" of Washington common law of contract interpretation to show that the writing at issue was

only a partial integration of the total agreement. It was the court, on its own motion, that supplied the interpretation that all future torts were also licensed by the writing; the Defendant CBC did not even meet its initial burden against the tort claims. Dismissal on summary judgment was in error.

**B. Issue 2:** Should the trial court have applied the "Context Rule" of contract interpretation, which requires that all factors surrounding the agreement be considered, and which requires that such contextual facts be found by the jury? (Assignment of Error 1.)

**Answer: Yes, the trial court should have applied, but did not apply, the "Context Rule" of contract interpretation, and should have allowed the jury to consider all factors surrounding the agreement.**

**1. The "Context Rule": *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) and Its Progeny**

**a. *Berg*: Context Rule Applies, Even if Writing is NOT Ambiguous**

The Washington State Supreme Court clarified the common law of contract interpretation in 1990, in *Berg v. Hudesman,* 115 Wn.2d 657, 801 P.2d 222 (1990). The *Berg* court made clear that the task of the court was to get to the actual agreement. As part of making certain that the actual agreement is reached, no ambiguity of language is necessary to raise the following question: What was the complete objective agreement, including the unwritten terms?

The *Berg* court states:

> We thus reject the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible. Cases to the contrary are overruled.

*Berg v. Hudesman,* 115 Wn.2d 657, 801 P.2d 222 (1990).

**Application:** Mr. Mason raised genuine issues of material fact that the writing at issue was a partial integration, and the "Context Rule" should have been applied by the trial court.

**b. *Diaz v. National Car Rental*: Extrinsic Evidence Appropriate**

In the 18 years since *Berg* was decided, it has been absolutely clear that extrinsic evidence is appropriate for the court to consider. *See, e.g., Diaz v. National Car Rental*, 143 Wn.2d 57, 17 P.3d 603 (2001). The *Diaz* court wrote:

> Extrinsic evidence may be used whether or not the contract language is ambiguous. *U.S. Life Credit Life Ins. Co. v. Williams,* 129 Wn.2d 565, 569, 919 P.2d 594 (1996) (citing *Berg*, 115 Wn.2d at 669).

143 Wn. 2d at 66-67.

**Application:** The trial court expressed an aversion to the Context Rule. Nonetheless, Mr. Mason relied upon the Context Rule in forming his contract with CBC. As the long-standing common law of Washington, the trial court should have applied the Context Rule.

**c. *Scott Galvanizing*: Intent of the Parties is Key**

There was an objective meeting of the minds between Craig Mason and CBC, and through its president, Lee Thornton. The total agreement at issue was partially integrated. That CBC might have had a secret intent to defraud Mr. Mason does not incorporate that secret fraudulent intent into the agreement. Instead, the overt meeting of the minds is what should be explored in terms of the Context Rule. *See, e.g., Scott Galvanizing, Inc., v. Northwest EnviroServices*, 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993)

*Scott Galvanizing* is worth quoting at length to show the legal pervasiveness of the Context Rule as articulated in *Berg*:

> Indemnity agreements are interpreted like any other contracts, *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (1974), and the touchstone of the interpretation of contracts is the intent of the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990); *Bonneville Power Admin. v. WPPSS*, 956 F.2d 1497, 1505 (9th Cir. 1992) (applying Washington law). Therefore, the intention of the parties must be the starting point for the interpretation of the indemnity agreement. *See Scruggs v. Jefferson Cy.*, 18 Wn. App. 240, 243, 567 P.2d 257 (1977) (indemnity provision construed to effectuate intent of the parties); *McDowell v. Austin Co.*, 105 Wn.2d 48, 53, 710 P.2d 192 (1985) (indemnity agreements enforced according to intent of parties). In Washington, the intent of

> the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)). *See, e.g., The Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 180-82, 810 P.2d 27 (determining meaning of "fence" by reference to "overall purpose" of homeowner's agreement), *review denied*, 117 Wn.2d 1013 (1991).

*Scott Galvanizing*, 120 Wn.2d at 580-81.

**Application:** It is not reasonable, when viewed in the whole context of his service at CBC, and when viewed in the context of the negotiations, that Mr. Mason would abandon three friends and colleagues under attack by the CBC administration. All the circumstances surrounding the making of the contract show that Mr. Mason was extremely concerned for Matt Mathesius, Cliff Wakeman, and Farhad Arshad. *See, e.g., CP: 235, 237-38 (First Declaration of Matt Mathesius), and CP: 465, 466, and 474 (Sworn Complaint).* It is surely a question for the jury to determine if this contract term was an oral term of the contract under dispute. The affidavits of Mr. Mason, Mr. Mathesius, and Lori Mason show that "but for" the contract term protecting these three men in their work

conditions, Mr. Mason would not have agreed to the contract later breached by Defendant CBC. *See Declaration of Craig Mason in Opposition, CP: 318, 322, and 329.* Dismissal on summary judgment was erroneous.

**2. Defendants' Misuse of *Berg:* Trial Court Should Focus on Issues OF the Agreement, Not IN the Written Partial Agreement**

The Defendants cite *Berg v. Hudesman, supra,* but then misinterpret the case. *CP: 517 (Defendants' Motion for Summary Judgment).* The Defendants falsely state that the point of *Berg* is that "the court must focus on the objective manifestations of the parties in the written contract." *CP: 517*

This misstates *Berg.* The Context Rule, by not requiring ambiguity **in** the agreement uses extrinsic evidence to find the objective manifestations **of the** agreement. This is why *Berg* orders the court to seek out the intent of the parties. To repeat the rule:

> In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." *Berg v. Hudesman,* 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

*Scott Galvanizing,* 120 Wn.2d at 580-81.

**Application:** The Defendants misstated the law of *Berg v. Hudesman* to the trial court, and *Berg* was then either ignored or misapplied; since genuine issues of material fact were created regarding the total agreement at issue, the resultant dismissal on summary judgment was erroneous.

**C. Issue 3:** Should the trial court have ignored the post-signing period of revocation of the agreement at issue, a 10 day period during which the Plaintiff offered fresh consideration for additional promises in guarantee of the contract at issue? (Assignment of Error 1.)

**Answer: No. The trial court should not have ignored the Period of Revocation of the agreement at issue, during which time the Plaintiff offered fresh consideration for additional guarantees, consistent with the original total agreement, for the working condition safety of Matt Mathesius, Farhad Arshad, and Cliff Wakeman.**

As is clear in Washington law, such modifications are analyzed under the Context Rule. *See e.g., Pacific Northwest Group v. Pizza Blends, Inc.*, 90 Wn.App 273, 277-78, 951 P.2d 826 (1998) ("A paradox of the common law is that a contract clause prohibiting oral modification is essentially unenforceable because the clause is itself subject to oral modification."), *and see Consolidated Electric Dist. Inc .v Gier*, 24 Wn.App 671, 677-78, 602 P.2d 1206 (1979) (Summary judgment reversed because debtor's sworn testimony that the creditor waived the guaranty raised a question of material fact as to whether the guarantee was orally terminated).

This argument was raised by Mr. Mason. *CP: 38, 41, 42, 47, 298, 303, 307, 314, 318, 321, 322, 330, 331, 439, 440, and 487.* However, the trial court simply refused to address it. This refusal was error.

**D. Issue 4:** Once the trial court construed the boilerplate language of the contested partial integration in favor of the Defendants, and thus construed the partial integration as a fully integrated settlement and waiver, should the trial court then have read the waiver to not only reference recompense for past wrongs, but also construe the waiver as a license for the Defendants to commit future wrongs against the Plaintiff with legal impunity, and should the trial court have held that the agreement waived all of Plaintiff's future legal actions against any and all future wrongs committed by the Defendants against the Plaintiff? (Assignment of Error 1.)

**Answer: No. The negotiation prior to agreement was in terms of compensation for past wrongs, with CBC offering future behavior ( of no harm to Plaintiff or three colleagues) as additional consideration, without which there would be no agreement. At no point was a CBC license to commit future torts against Mr. Mason in the contemplation of the parties.**

There is simply nothing in the record to indicate that the Defendant CBC presented facts to support that the Total Agreement, or even the writing in partial integration, contemplated a license to commit future torts. *CP: 642-644.* This interpretation was supplied *sua sponte* by the trial court as a means to award summary judgment to the moving party. *CP:*

*642-44*. Sanctions were also based upon this *sua sponte* interpretation of the facts. *CP: 644*.

Mr. Mason subsequently called the court's attention to the fact that no prior assertion had been made that there was somehow a license granted to the Defendants to commit future torts. *CP: 644*. Mr. Mason again raised this issue on Motion for Reconsideration. *CP: 38, 46-7*.

**E. Issue 5:** Should the trial court -- having construed the facts in favor of the moving party and having interpreted the waiver provisions of the agreement at issue to waive all future legal action -- have dismissed all non-contract causes of action? (Assignment of Error 1.)

**Answer: No. The other causes of action were wrongly dismissed.**

**1. Third-Party Beneficiaries: Specifically Bargained-For**.

It is an interesting question whether Mr. Arshad and Mr. Mathesius would have a right to sue under Mr. Mason's agreement. For an analogous discussion, *see, e.g, Tex Enters., Inc. v. Brockway Standard, Inc.*, 149 Wn.2d 204 (2003). However, this is not the issue. The issue is Mr. Mason's right to defend the interests of specifically bargained-for third-party beneficiaries.

**a. Right of Mr. Mason to Sue for Specifically Bargained Benefits: The Promised Employment Condition Safety of Mr. Mathesius, Mr. Arshad, and Mr. Wakeman.**

Even in the more harsh commercial setting, absent the special relationships that existed in this case, Mr. Mathesius and Mr. Arshad were specifically-bargained for third-party beneficiaries, and are appropriately analyzed as third-party beneficiaries whose rights can be enforced. *Tex Enters*, 149 Wn.2d at 213-214. *See also, e.g., Burke & Thomas, Inc. v. Int'l Org. of Masters, Mates & Pilots*, 92 Wn.2d 762, 767, 600 P.2d 1282 (1979) (holding that 'creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract'), and for another statement of the general law, on different facts, *see, e.g., Coast Trading v. Parmac, Inc.*, 21 Wn. App. 896, 587 P. 2d 1071 (1978). See, also, e.g., *Haberman v. WPSS*, 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987) ("Thus, while a duty in a fraud case may be owed by a defendant to plaintiffs in privity, a fiduciary relationship, or a limited class of persons, a duty may also arise to those third persons whom the defendant intends or has reason to expect will receive the information, especially in a business transaction where a defendant has knowledge necessary to prevent misrepresentation, or facts basic to the transaction where the plaintiff would reasonably expect disclosure").

**b. Conclusion: Mr. Mason Clearly Has A Right to Sue for His Benefits for Intended Third-Party Beneficiaries.**

The employment safety of Mr. Arshad and Mr. Mathesius was specifically bargained-for, and was specifically agreed to, to induce Mr. Mason to sign the agreement, and was specifically reiterated as a promise to keep Mr. Mason from revoking the agreement during its period of revocation. Mr. Mason has clear evidence that "but for" the agreement encompassing these third-party benefits, there would have been no agreement. It was error to dismiss this claim.

**2. Breach of Special Relationship**

The law is clear that bargaining in a special relationship of confidence and trust, or any other special relationship, leaves the harmed party a lower threshold to cross to show the liability of the one who misled him. *See, e.g., Colonial Imports v. Carlton Northwest*, 121 Wn.2d 726, 853 P.2d 913 (1993) *and Van Dinter v. Orr*, 157 Wn. 2d. 329 (2006).

The circumstances of this agreement show that CBC was grievously abusive of the special relationship which Lee Thornton had cultivated with Mr. Mason. It was error to dismiss this claim.

**3. Fraud: Specifically Pled, and Facts Make It a Viable Claim**

Fraud was specifically pled in the complaint. *CP: 470-71*. The immediacy with which Mr. Arshad and Mr. Mathesius were attacked show that an on-going

intent to defraud Mr. Mason was present during the period in which he was induced to sign the agreement. *CP: 318-31: (Mason Dec. in Opp., en passim), and see CP: 346 ( Exhibit B, excluded by the trial court), at its page 7, where Farhad Arshad recounts that after Craig Mason had signed the agreement to leave, Rich Cummins boasted he would drive Craig Mason out of CBC.*

**4. Other Causes of Action: Restitution, Emotional Distress, Etc.**

The other causes of action (defamation, emotional distress, restitution, etc.) were terminated on June 20, 2008, because the trial court held that Mr. Mason had provided CBC a license to commit future torts. *CP: 642-644.*

This was double error. First, no such argument had been contemplated or presented, or entered into the record in any way.

Second, to repeat the law, this violates the Context Rule of Washington common law. As noted, the trial court failed to apply the "Context Rule." *See Flower v. TRA Industries,* 127 Wn.App. 13, 111 P.3d 1192 (2005), and cases cited therein. *See also Pacific Northwest Group v. Pizza Blends, Inc.*, 90 Wn.App 273, 277-78, 951 P.2d 826 (1998) ("A paradox of the common law is that a contract clause prohibiting oral modification is essentially unenforceable because the clause is itself subject to oral modification."), *citing*, among other cases, *Kelly Springfield Tire Co. v. Faulkner*, 191 Wa. 549, 554-556, 71 P. 2d 382 (1937) (A contract could be orally modified despite a contractual prohibition on such modifications because it was settled law that "...a contract may be modified or abrogated by the parties

thereto in any manner they choose, not withstanding provisions therein prohibiting its modification or abrogation except in a particular manner," at 556). *And see Consolidated Electric Dist. Inc. v Gier*, 24 Wn.App 671, 677-78, 602 P.2d 1206 (1979) (Summary judgment reversed because debtor's sworn testimony that the creditor waived the guaranty raised a question of material fact as to whether the guarantee was orally terminated).

The Defendants never addressed the other causes of action, and without the license in waiver of future torts, constructed by the trial court on June 20, 2008, those causes of action would have necessarily gone forward. The Defendant CBC had not properly filed a motion to address any other issues. *See, e.g., R.D. Merrill, Co. v. Pollution Board*, 137 Wn.2d 118 (1999) (nothing in CR 56(c) allows the raising of additional issues other than in the motion and memorandum in support of the motion) *and see White v. Kent Med. Ctr, Inc.*, 61 Wn.App 163, 168, 810 P.2d 4 (1991) (allowing the moving party to raise new issues in rebuttal materials gives the non-moving party no opportunity to respond).

These common law rules are well-settled in Washington and should be followed. Summary judgment for the defendant on these additional causes of action was clear error of law.

**5. Pre-Agreement Wrongs versus Future Wrongs**

**a. Mr. Mason Has Not Sued CBC Regarding Past Wrongs**

It is clear from the record that Mr. Mason never filed suit against CBC for past wrongs -- for wrongs done prior to November, 2003. When CBC breached the November of 2003 agreement (by attempting to fire Matt Mathesius and Farhad Arshad), Mr. Mason, under Washington law, would have had the right to revive the prior tort claims which formed the basis of the partially integrated settlement agreement. *See, e.g., Rosen v. Ascentry Technologies*, 143 Wn.App. 364, 177 P.3d 765 (2008).

Instead, Mr. Mason's consideration for the partially integrated settlement agreement was fulfilled in November of 2003: Mr. Mason withdrew his tort claim against CBC, and Mr. Mason never filed future suit regarding the subject matter of tort claims that accrued **prior** to November of 2003.

**b. Mr. Mason's Current Suit Addresses Wrongs Committed After November, 2003**

On the face of the record, it is plain that Mr. Mason filed suit against CBC for wrongs committed after November, 2003. It was clear error of law to dismiss the actions that accrued after the November 2003 settlement agreement was reached. Mr. Mason's consideration for the agreement was to waive past claims, withdraw his tort claim, and to leave employment at CBC in June of 2004. Mr. Mason provided his full and complete consideration for the

agreement, even if the agreement is construed (wrongfully) in favor of the moving party.

Summary judgment was reversible error.

**6. Conclusion: The Trial Court Committed Reversible Error to Dismiss Claims Accruing After November, 2003.**

It was error for the trial court to construe the partially integrated writing as a fully integrated license granted by Mr. Mason to allow CBC to commit future torts. Nothing in the record supports this construction, and the order of summary judgment on the above claims should be reversed.

**F. Issue 6:** Did the court err on June 20, 2008, in denying Plaintiff's CR 56(f) request for more time for discovery to meet Defendants' Motion for Summary Judgment, as the record clearly showed the reasons for the discovery schedule? (Assignment of Error 2.)

**Answer: Yes, the trial court erred in failing to provide the Plaintiff extra time when the discovery and trial schedule had been set around Mr. Mason's teaching schedule.**

**1. Second Trial Schedule: Set Around School Year**

At the time the second trial schedule was set, Mr. Mason was teaching English on the Colville Indian Reservation. *CP: 213-17, 332-36.* Craig Mason had filed with the court that Spokane's Center for Justice would take over the trial of his case, after summary judgment, and that Mr. Mason needed the summer of

2008 for discovery. *CP: 319-20.* The Defendants agreed to this schedule, and then deliberately set out to substantively subvert the case schedule with this motion for summary judgment.

**2. Conclusion: Plaintiff's CR 56(f) Motion Should Have Been Granted**

For the reasons stated above, and based upon Mr. Mason's CR 56(f) affidavit, more time should have been granted.

**G. Issue 7:** Did the court err on June 20, 2008 in denying Plaintiff's CR 56(f) motion, as the legal standard for granting more time under CR 56(f) had been met? (Assignment of Error 2.)

**1. Good Reason; What Would Be Established; Material Facts**

Good reason for the delay had already been shown, as Mr. Mason was teaching in a remote area. *CP: 333-336.* Mr. Mason needed time to compel discovery from CBC, to locate Farhad Arshad, and to depose witnesses. *CP: 319-320.* These all related to material facts.

**2. Conclusion: Plaintiff's CR 56(f) Motion Should Have Been Granted**

For the foregoing reasons, Plaintiff's CR 56(f) Motion should have been granted.

**H. Issue 8:** Did the court fail to apply the proper legal standard in granting Defendants' request for sanctions under RCW 4.84.185? (Assignment of Error 3.)

**Answer: Yes. The trial court did not apply the proper legal standard. The RCW 4.84.185 standard is that a frivolous action is one that cannot be supported by any rational argument on the law or facts, and this standard was not applied.**

**1. Standard of RCW 4.84.185: No Rational Argument**

Under RCW 4.84.185, for an action to be frivolous, it must be one "that cannot be supported by any rational argument on the law for the facts." *See, e.g., Legal Foundation v. TESC*, 44 Wn. App. 690 (1986) ("A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts. *Bennett v. Passic*, 545 F.2d 1260, 1261 (10th Cir. 1976). However, allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, frivolous. *Hughes v. Rowe*, 449 U.S. 5, 66 L. Ed. 2d 163, 101 S. Ct. 173, 178 (1980).").

In evaluating a case as frivolous, the case must be taken as a whole. *Biggs v. Vail,* 119 Wn.2d 129, 830 P.2d 350 (1992). Cases of first impression that present debatable issues of substantial public importance are not frivolous. *Linda D. v. Fritz C.*, 38 Wn. App. 288, 301, 687 P.2d 223, *review denied,* 102 Wn.2d 1024 (1984), *cited in Moorman v. Walker*, 54 Wn.App. 461, 464, 773 P.2d 887 (1989).

Although the standard of review is stated as abuse of discretion, the current review is *de novo*, and in any event the issue turns on the analysis of whether or not there was a rational basis in fact or in law for the suit.

As the *Tellevik* case stated in reversing an award of attorneys fees under RCW 4.84.185 (emphasis added):

> We find the issues presented in the action against Janet Pearson raised meritorious issues under the statute regarding the innocent owner provision. The trial court abused its discretion in awarding attorney fees.

*Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 91-92, 838 P.2d 111 (1992) (to use the wrong legal standard is abuse of discretion).

**2. Mr. Mason's Case Had Rational Law and Rational Facts**

The trial court initially denied summary judgment and prepared to set this case for trial. *CP: 623.* By the very logic of first deciding in favor of Mr. Mason, the court must have initially been operating upon some rational basis in law or fact supporting Mr. Mason's action.

Only after construing the partial integration at issue -- (a) as a total integration, and then (b) *sua sponte*, as a license to commit future torts -- did the court then determine that Mr. Mason's suit had been frivolous. *CP: 642-644, 654.*

The court abused its discretion to conclude that Mr. Mason's suit was frivolous under RCW 4.84.185.

**I. Issue 9:** Did the court fail to properly find specific facts to support a finding under RCW 4.84.185 that Mr. Mason's claims were entirely without rational basis in law or fact? (Assignment of Error 3.)

**Answer: Yes. Having itself initially decided in Mr. Mason's favor, the court then simply concluded that Mr. Mason's suit was frivolous, without specific factual findings.**

The entirety of the one finding which supported the award of fees under RCW 4.84.185 may be found in the cited record. *CP: 654.*

This is insufficient to support an award under RCW 4.84.185. *See, e.g., Tellevik v. 31641 W. Rutherford St.,* 120 Wn.2d 68, 838 P.2d 111 (1992); *Biggs v. Vail,* 119 Wn.2d 129, 830 P.2d 350 (1992).

**J. Issue 10:** Did the court err on June 20, 2008 in granting, in part, Defendants' motion to strike portions of Plaintiff's affidavits, as the stricken material was only offered to prove the actions directly witnessed by the declarants, or otherwise not to prove the matter asserted? (Assignment of Error 4.)

**Answer: Yes. The Court erred to exclude the "Farhad Packet," Exhibit B to Mr. Mason's Declaration, because it was offered to verify that which was directly observed by the declarant, Mr. Mason, and it was offered not to prove the truth of the underlying facts in the documents, but as proof of what led Mr. Arshad to file Federal suit against CBC, and to terminate his friendship with Mr. Mason – facts directly testified to by Mr. Mason, Lori Mason, and Matt Mathesius.**

**1. Law of Hearsay: ER 801**

ER 801(c) reads: "*Hearsay* 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In *Snohomish County Fire District* the Court of Appeals upheld the trial court's admission of an affidavit that included the declarant's references to talking to others, and included an email from an assistant attorney general. These were admitted to show what the declarant had done, and what the declarant had seen. *Snohomish County Fire District No. 1 v. Snohomish County Disability Board*, 128 Wn. App. 418, 15 P.3d 1057 (2005).

The facts and rationale of *Snohomish* are quoted below:

> The District argues that the trial court erred in admitting the affidavit of Ken Crowder in support of the Board's motion for summary judgment because portions of the affidavit were not based on personal knowledge and it contained inadmissible hearsay statements and legal conclusions. Because the motion to strike was made in conjunction with the motions for summary judgment, we review the trial court's decision de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The District argues that Crowder's statements regarding claims and the Board's decision to approve preventative dental services were not based on personal knowledge. As a member of the Board, however, Crowder would have personal knowledge about the claims the Board

was receiving and the Board's reasoning for including preventative care.

The District also challenges two portions of the declaration where Crowder states that he spoke with others regarding the issue. The District argues that this constitutes inadmissible hearsay. By definition, hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." ER 801(c). Here, Crowder's statements were offered to show the research and procedure that the Board used in adopting the Rules, not to prove the truth of the substance of the statements. Therefore, the portions cited do not constitute hearsay.

Additionally, the District argues that portions of the declaration contain inadmissible legal conclusions. The statements, when taken in context of the declaration, were not legal conclusions. Rather, they were describing the acts that the Board took to ensure that its actions had factual and legal support.

Finally, the District argues that Exhibit F to the Declaration, which is an e-mail from an assistant attorney general, is improper and should be stricken. The Board is not arguing that this is an opinion of the attorney general. Rather, the Board presented the e-mail to show the steps it took in researching the Rules. Therefore, we affirm the trial court's decision denying the District's motion to strike the declaration.

*Snohomish County Fire Dist. No. 1 v. Snohomish County*, 128 Wn. App. at 424.

**2. Application of *Snohomish Fire District* to the Facts**

The interpretation of ER 801(c) from Snohomish County Fire Dist., *supra*, is directly apt to this case. Exhibit B to the Declaration of Craig Mason in Opposition to Defendants' Motion for Summary Judgment is of the exact same character as the Affidavit admitted on the facts, in the case above. *CP: 337-400.* Exhibit B, the "Farhad Packet" should be admitted to consideration, and it was error to exclude it.

The truth of every document in the packet was not being attested to by Mr. Mason, but what he saw, and what Mr. Arshad did with the packet, and what Mr. Arshad's reasons where, rationally inferred by Mr. Mason, are all supported by the exhibit. *See, e.g., Domingo v. Boeing Emples. Credit Union*, 124 Wn. App. 71, 98 P.3d 1222 (2004) (In a wrongful termination case based on alleged discrimination, a supervisor's description of what she saw on a videotape was not hearsay, as the testimony was not offered for the truth of the matter asserted, but was offered to show the supervisor's motivation for the decision to reprimand and eventually terminate employment), *and see, Estate of Jones*, 116 Wn. App. 353, 67 P.3d 1113 (2003) (Appraisals offered in evidence by an estate beneficiary who was seeking the personal representative's removal for alleged self-dealing should not have been excluded as hearsay because they were not offered to prove the accuracy of the appraisals, but to provide a foundation for the beneficiary's belief that

the personal representative had not paid enough for the decedent's home). Lori Mason also saw this packet, which Mr. Mason saw sent via courier to all Tri-City attorneys, arrive at the office at which she worked at the time. *CP: 295, at 299.* And a Federal lawsuit filed by a Tri-City attorney, Janet Taylor, resulted from Mr. Arshad's distribution of the packet that comprises Exhibit B to Mr. Mason's Declaration. *CP: 324.*

Exhibit B to *Craig Mason's Declaration in Opposition* should have been admitted and considered by the trial court. ER 803(a)(3) and ER 804(a)(5) are alternate basis to enter this exhibit.

## V. Conclusion: Summary Judgment Erroneously Granted

### A. Argument Summary

Had the trial court construed the facts properly, against the moving party, then it would have had to find that Plaintiff Craig Mason had created genuine issues of fact. Instead, the trial court construed facts in favor of the moving party, and ignored the Context Rule of Washington contract law. Then the trial court went further, on its own motion, to transform the agreement at issue into a license for the Defendants to commit future torts against Mr. Mason with impunity. Finally, on the basis of this licensing argument not made, and for which no facts were presented, the court dismissed Mr. Mason's suit against CBC, and awarded sanctions to the Defendants.

These clear errors of law merit reversal.

**B. Relief Requested**

Plaintiff requests that the Court of Appeals reverse the summary judgment, reinstate the case, and order the lower court to set a case scheduling order with substantial discovery time.

Alternatively, the Plaintiff requests that the summary judgment be reversed, and, on reinstatement of the case, six months more time be allowed the Plaintiff under CR 56(f) for additional discovery.

RCW 4.84.185 sanctions should be reversed, as the wrong legal standard was applied, and no appropriate specific findings were made.

Finally, the rules of evidence should be properly applied to allow that which is not hearsay (e.g., Exhibit B, "Farhad Packet," supra) to be admitted, and hearsay which falls under proper exceptions be admitted.

Plaintiff Craig Mason requests that this case be remanded to the trial court, to set a reasonable trial schedule.

Respectfully Submitted,

Craig A. Mason
WSBA#32962
Appellant, Attorney Pro Se

# APPENDIX

## Table of Cases

### Washington Cases

*Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 618 P.2d 96 (1980).

*Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

*Biggs v. Vail*, 119 Wn.2d 129, 830 P.2d 350 (1992).

*Bort v. Parker*, 110 Wn. App. 561, 42 P.3d 980 (2002).

*Burke & Thomas, Inc. v. Int'l Org. of Masters, Mates & Pilots*, 92 Wn.2d 762, 600 P.2d 1282 (1979).

*City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006).

*Coast Trading v. Parmac, Inc.*, 21 Wn. App. 896, 587 P. 2d 1071 (1978).

*Colonial Imports v. Carlton Northwest*, 121 Wn.2d 726, 853 P.2d 913 (1993).

*Consolidated Electric Dist. Inc .v Gier*, 24 Wn.App 671, 602 P.2d 1206 (1979).

*DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 959 P.2d 1104 (1998).

*Diaz v. National Car Rental*, 143 Wn.2d 57, 17 P.3d 603 (2001).

*Domingo v. Boeing Emples. Credit Union*, 124 Wn. App. 71, 98 P.3d 1222 (2004).

*Estate of Jones*, 116 Wn. App. 353, 67 P.3d 1113 (2003).

*Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964).

*Flower v. TRA Industries*, 127 Wn.App. 13, 111 P.3d 1192 (2005).

*Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998).

*Haberman v. WPSS*, 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987).

*Hughes v. Rowe*, 449 U.S. 5, 66 L. Ed. 2d 163, 101 S. Ct. 173, 178 (1980).

*Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 527 P.2d 1115 (1974).

*Kalmas v. Wagner*, 133 Wn.2d 210, 943 P.2d 1369 (1997).

*Kelly Springfield Tire Co. v. Faulkner*, 191 Wa. 549, 71 P. 2d 382 (1937).

*Legal Foundation v. TESC*, 44 Wn. App. 690 (1986).

*Linda D. v. Fritz C.*, 38 Wn. App. 288, 687 P.2d 223, *review denied*, 102 Wn.2d 1024 (1984).

*McDowell v. Austin Co.*, 105 Wn.2d 48, 710 P.2d 192 (1985).

*Moorman v. Walker*, 54 Wn.App. 461, 773 P.2d 887 (1989).

*Pacific Northwest Group v. Pizza Blends, Inc.*, 90 Wn.App 273, 951 P.2d 826 (1998).

*R.D. Merrill, Co. v. Pollution Board*, 137 Wn.2d 118 (1999).

*Ranger Insurance v. Pierce County*, 164 Wn.2d 545, 192 P.3d 886 (2008).

*Rosen v. Ascentry Technologies*, 143 Wn.App. 364, 177 P.3d 765 (2008).

*Scruggs v. Jefferson Cy.*, 18 Wn. App. 240, 243, 567 P.2d 257 (1977).

*Scott Galvanizing, Inc., v. Northwest EnviroServices*, 120 Wn.2d 573, 844 P.2d 428 (1993).

*Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995).

*Snohomish County Fire District No. 1 v. Snohomish County Disability Board*, 128 Wn. App. 418, 15 P.3d 1057 (2005).

*Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 510 P.2d 221 (1973).

*Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 838 P.2d 111 (1992).

*Tex Enters., Inc. v. Brockway Standard, Inc.*, 149 Wn.2d 204 (2003).

*The Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 810 P.2d 27 *review denied*, 117 Wn.2d 1013 (1991).

*U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 919 P.2d 594 (1996).

*Van Dinter v. Orr*, 157 Wn. 2d. 329 (2006).

*White v. Kent Med. Ctr, Inc.*, 61 Wn.App 163, 168, 810 P.2d 4 (1991).

*Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

**Cases from Other Jurisdictions**

*Bennett v. Passic*, 545 F.2d 1260, 1261 (10th Cir. 1976).

*Bonneville Power Admin. v. WPPSS*, 956 F.2d 1497, 1505 (9th Cir. 1992).

**STATUTE**

**RCW 4.84.185:**

4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of

attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

**COURT RULES**

**CR 56:**

Rule 56. Summary judgment

(a) *For claimant* A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party* A party against whom a claim, counterclaim, or cross claim is

asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings* The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion* If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his

response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable* Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) *Form of order* The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

**ER 801:**

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant* A "declarant" is a person who makes a statement.

(c) *Hearsay* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay* A statement is not hearsay if--

(1) *Prior statement by witness* The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent* The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

**ER 803:**

Rule 803. Hearsay exceptions; availability of declarant immaterial

(a) *Specific exceptions* The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited utterance* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition* A statement of the declarant's then existing state of mind, emotion,

sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity* [Reserved. See RCW 5.45.]

(7) *Absence of entry in records kept in accordance with RCW 5.45* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any

form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports* [Reserved. See RCW 5.44.040.]

(9) *Records of vital statistics* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of public record or entry* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of religious organizations* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, baptismal, and similar certificates* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family records* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, tattoos, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of documents affecting an interest in property* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document

was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents* Statements in a document in existence 20 years or more whose authenticity is established.

(17) *Market reports, commercial publications* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned treatises* To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation concerning personal or family history* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) *Reputation concerning boundaries or general history* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) *Reputation as to character* Reputation of a person's character among his associates or in the community.

(22) *Judgment of previous conviction* Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to personal, family, or general history, or boundaries* Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(b) *Other exceptions* [Reserved.]

**ER 804:**

Rule 804. Hearsay exceptions; declarant unavailable

(a) *Definition of unavailability* "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

(6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the

procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement under belief of impending death* In a trial for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) *Statement against interest* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in his position would not have made the statement unless he believed it to be true. A statement tending to

expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history* (i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Other exceptions* [Reserved.]

## APPENDIX K

## COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

**Court of Appeals Number 273229**

**[Filed January 26, 2009]**

| | |
|---|---|
| Craig Mason, | ) |
| **Appellant**, | ) |
| vs. | ) |
| Columbia Basin College, | ) |
| Columbia Basin Board of Trustees, | ) |
| Lee Thornton, Rich Cummins, Meg | ) |
| Woods, and the marital community | ) |
| of Meg Woods and Rich Cummins, | ) |
| David Shaw and the marital | ) |
| community of David Shaw and | ) |
| Jane Doe Shaw, Deborah Meadows | ) |
| and the marital community of | ) |
| Deborah Meadows and Mike | ) |
| Grinnell, Ruben Lemos and the | ) |
| marital community of Ruben | ) |
| Lemos and Jane Doe Lemos, and | ) |
| Bill McKay and the marital | ) |
| community of Bill McKay and | ) |
| Jane Doe McKay, | ) |
| **Respondents** | ) |
| | ) |

# REPLY BRIEF OF APPELLANT: CRAIG MASON

Craig Mason, Appellant
Attorney Pro Se
N. 3007 Cincinnati
Spokane, WA, 99207
WSBA# 32962

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1 **I. Summary of Appellant Craig Mason's Reply Brief**

1 **A. Respondent Left Crucial Appellant Arguments/Issues Un-rebutted.** Respondent College failed to address subsequent consideration for subsequent agreement, failed to address the sole factual finding (license to commit future torts with legal impunity) underlying the granting of summary judgment, and failed to construe facts appropriately under the context rule of contract interpretation.

2 **B. Respondent Raised the Wrong Standard of Review.** The proper standard of review on summary judgment is *de novo*. All facts are before the court, *de novo,* including the facts regarding any findings that could justify an award under RCW 4.84.185. All facts and inferences from the facts should be construed in Mr. Mason's favor, and against the moving party, the Respondent College.

2 **C. Respondent's Case Law Is Inapt.** Respondent cites 12(b)(6)/RAP 2.5(a)(2) Motion to Dismiss standard, in the context of court deference to administrative interpretation of statute, to try to subvert *de novo* review on summary judgment. *Gross v. Lynwood*, 90 Wn.2d 395, 583 P.2d 1197 (1978) is an inapt citation.

4 **II. Un-rebutted Arguments and Un-Addressed Issues.** The Respondent College simply refused to address the case's fundamental issues in its *Response*, and Appellant should prevail on the un-rebutted claims.

5 **A. Statement of Issues in the Brief of Appellant.** The *Appellate Brief* (Brief) *Statement of the Issues* is revisited, and the court is reminded that the sole finding that led the trial court to reverse its initial dismissal of the College's summary judgment motion is that "[Craig Mason] promised to never sue him [Lee Thornton] again." *CP: 642.*

5 **B. Issues Omitted by Respondent from Its Brief.** Respondent College entirely fails to address Issues Pertaining to Error 3-5 from Brief. Each Issue is sufficiently wrongly decided to require reversing the granting of summary judgment.

7 **C. In Un-rebutted Arguments: The Facts Were Wrongly Construed.** The trial court construed the facts against the non-moving party. Instead, all reasonable inferences should have been construed against the moving party. The Respondent and the trial court erroneously construed the facts against the Appellant.

10 **D. Un-rebutted and Un-Addressed Issues: Problems at Law.** Issue 3, Post-signing agreements, and Issues 4 and 5 regarding Waiver of Rights, and License to Commit Future Torts were not addressed by Respondent.

10 **1. Issue 3: Post-signing agreements, and Period of Revocation Additional Agreements.** Post-signing modifications can be made under Washington law, and are questions of fact. Foregoing a right to revoke an agreement provided additional consideration for the additional guarantees promised.

11 **2. Issues 4 and 5: A Waiver Must Be Voluntary and Intentional Waiver of a Known Right.** A "waiver is the 'intentional and voluntary relinquishment of a known right.'The purported waiver of Appellant Mr. Mason's rights to file suit for future claims: (a) was never in the contemplation of the parties, and (b) was not raised by either party until the trial court, *sua sponte*, invented this waiver.

11 **III. Proper Standard of Review (Contra Respondent's Brief).** Review is de novo, the appellate court stands in the same place as the trial court, and must grant summary judgment only if no reasonable jury could possibly decide for the Appellant after all facts and inferences are construed in favor of the Appellant, Craig Mason.

11 **A. Review is *De Novo*.** The appellate court stands in the same position as did the trial court, and determines for itself whether there are genuine issues of material fact.

12 **B. CR 56 Requires Facts to be Construed AGAINST the Respondent.** In a summary judgment motion, all facts are to be construed against the moving party, and the moving party has the burden of showing that no reasonable jury could possibly decide in favor of the non-moving party.

12 **C. Meaning of Standard of Review: To Grant Summary Judgment, No Reasonable Jury Could Possibly Find for Appellant.** Summary judgment is appropriate only if no reasonable jury could find for the Appellant. If there are genuine issues of material fact, then the case should be allowed to proceed, and dismissal on summary judgment is erroneous.

13 **D. Respondent's Misleading Standard of Review: Citing *Gross*.** Gross is cited by Respondent to justify Court of Appeals deference to the trial court. *Gross* is an erroneous citation in that *Gross* was: (1) a motion to dismiss for failure to state a claim, and (2) the *Gross* case involved deference to administrative rules that construed the statute which underlay the claim.

15 **E. RCW 4.84.185: *De Novo* Review of the Facts – *Gross* Revisited.** The Respondent cites the "abuse of discretion" standard for RCW 4.84.185. However, under *de novo* review, all facts are up for review by the Appellate Court, and therefore deference to the facts underlying an award of RCW 4.84.185 fees would be grossly inconsistent with an appeal on summary judgment. In *de novo* review, all facts are before the Court of Appeals.

16 **F. Application of the Proper Standard of Review to Summary Judgment.** Trial court improperly construed the facts against Mr. Mason, Appellant.

16 **1. Application of Law to Factual Issues.** Construing the facts against the moving College, there are numerous jury questions. The factual issues acknowledged by the trial court should have remained determinative, and summary judgment should have been denied.

17 **2. Application of Non-Alleged Facts as the Trial Court Created a Waiver For the Respondents for Future Torts.** The trial court erred to construe the facts against Mr. Mason, the non-moving party, and the trial court further erred to propound a theory that the contract at issue was a binding waiver by Mr. Mason to ever sue the Respondent for any future torts the College might commit.

19 **3. Summary Judgment Was Erroneously Granted.** The trial court erroneously construed the facts in favor of the moving party, and should be reversed.

19 **IV. Review of Applicable Washington Law, As Applied to Respondent's Arguments.** Respondent's arguments are also flawed regarding contract, tort, and RCW 4.84.185.

20 **A. Respondent's Factual Problems.** Respondent relies upon factual allegations not properly cited to any record, in violation of RAP 10.3(a)(5).

**B. Structure of Respondent's Argument.** Respondent construes facts in its favor, and combines these misconstrued facts with assertions not cited to the record. No grant of summary judgment should stand with the facts thus wrongly construed. The wrongly construed facts include the integration clause at issue, special relationships at issue, and facts regarding third party beneficiaries.

**C. REPLY to Respondent's Arguments.**

**1. Third Party Beneficiaries – REPLY to *Response Sections V.B* and *V.D.*** No modern third-party beneficiary contracts could survive Respondent's erroneous interpretation of the law.

**2. *Berg v. Hudsman* and the Context Rule – REPLY to *Response Section V.C.*** Contract terms are questions of fact, and thus summary judgment is inappropriate in cases where genuine disagreement is shown.

**a. *Berg v. Hudesman:* Context Rule Applies, Even if the Writing at Issue is NOT Ambiguous -- Contract Terms are Questions of Fact.** The task of the court was to get to the actual agreement between the parties, and no ambiguity of language is necessary to raise the question the court must investigate: What was the complete objective agreement, including the unwritten terms? These are questions of fact -- jury questions.

**b. Meaning of *Mutual of Enumclaw*, 164 Wn.2d at 425 – Contract Terms are Questions of Fact.** As a "mixed question of law and fact" the terms of a contract are jury questions.

25 **c. Application of *Mutual of Enumclaw*: Disputed Facts.** When the facts of a contract are disputed, there is a question of fact for the jury.

25 **3. Special Relationships – REPLY to *Response Section V.E.*** Friendship or other personal relationships of confidence and trust, or courses of dealing of trust, create a duty to disclose, or even to protect as a fiduciary, the one without knowledge known to the other party in such a special relationship.

25 **a. Special Relationship Case Law: Moral, Social and Personal Bases.** A claim for fraud may be based on failure to disclose a material fact when there is a duty to disclose because of the nature of the parties' relationship. Personal ties, friendship, or any other moral, social, domestic or personal relationship can create a special relationship and special duties.

26 **b. Special Relationships are Questions of Fact for the Jury.** No matter what relationships exist as a matter of law exist, fiduciary relationships can arise as a matter of fact. Whether such a fiduciary relationship exists in fact in this case depends on the development of factual proof and comprises a jury question. Properly construing facts against the moving party shows that Mr. Mason had created jury questions on the issue of special relationships.

28 **c. The Context Rule and Special Relationships: *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004).** The Context Rule of contract interpretation applies to special

relationships, and Mr. Mason and CBC President Thornton had a long course of dealing that made it reasonable for Mr. Mason to trust Thornton, such that the issues of fraud, misrepresentations, and breaches of this trust are all jury questions.

28 **4. CR 56(f) – REPLY to *Response Section V.F.*** More time under CR 56(f) should have been granted the Appellant.

29 **V. Policy Implications for Settlement Agreements of Trial Court's Invention of Waiver as License to Commit Future Torts.** Quite apart from the errors of law and fact made by the trial court, the policy implications of the trial court's decision would be to destroy settlement agreements. No plaintiff would enter into one.

29 **A. Law of Settlement Agreements.** Settlement agreements are contracts, and the party suffering the breach may revive its settled claims. *See, e.g., Rosen v. Ascentry Technologies*, 143 Wn.App. 364, 177 P.3d 765 (2008).

30 **B. Policy of Settlement Agreements.** The trial court's ruling would allow sexual harassers a license to harass, polluters a license to pollute, etc., all because the wrong-doers admit a wrong and settle a suit, whose settlement contract becomes a license to do more wrong. This view is untenable as policy, or as law.

30 **VI. Conclusion and Relief Requested.** On multiple valid bases, each sufficient in itself, Appellant Craig Mason respectfully requests that this case be remanded for a new case scheduling

order, and a new trial date, with ample discovery time.

## 31 APPENDIX

**Table of Cases**

**Statutes**

**Court Rules**

## I. Summary of Appellant Craig Mason's Reply Brief

### A. Respondent Left Crucial Appellant Arguments/Issues Un-rebutted.

In its Response Brief (hereinafter *Response*), the Respondent College provided a "Counterstatement of the Issues" in which the Respondent does not address the trial court's sole basis for summary judgment – the trial court's *sua sponte* ruling that the Appellant, Mr. Mason, had waived all future torts against him when he released the College for prior torts. Respondent does not address subsequent agreements and additional agreements made after the signing of the partial integration ("release") for which Mr. Mason offered new consideration (right to revoke). Further, the Respondent College's Response did not address subsequently committed fresh torts that the trial court deemed to have been licensed by the partial integration at issue. In sum, even if the facts regarding the contract at issue are erroneously construed against the Appellant, Mr. Mason, as to the partial integration, these causes of action should stand in the face of a hostile and erroneous construction of the facts.

These causes of action, regarding the license to commit torts with legal impunity, and regarding the period-of-revocation-consideration, are not addressed by the Response Brief, and stand without rebuttal.

The trial court erroneously construed the facts in favor of the moving party, and the trial court erroneously created a license for the Respondent College to commit future harms with legal impunity,

and the trial court's grant of summary judgment should be reversed.

**B. Respondent Raised the Wrong Standard of Review.**

The proper standard of review on summary judgment is *de novo*. All facts are before the court, *de novo*. *Ranger Insurance v. Pierce County,* 164 Wn.2d 545, 552, 192 P.3d 886 (2008) (upholding reversal of summary judgment); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). *De novo* review would include the facts regarding any findings that could justify an award under RCW 4.84.185.

Appellant Mason's Reply Brief Relies upon the Statement of Facts as filed in the Appellant's original Appellate Brief (hereinafter *Brief*).

**C. Respondent's Case Law Is Inapt**

As part of raising the wrong standard of review, the Respondent misleads the court by citing *Gross v. Lynwood*, 90 Wn.2d 395, 583 P.2d 1197 (1978) to argue that appellate review of summary judgment should be deferential to the trial court. *Response at p. 6.*

*Gross v. Lynwood* was a Motion to Dismiss for failure to state a claim, and the basis of the dismissal was the statutory construction of RCW 49.44.090 (setting a minimum age of 40 to be a victim of age discrimination, where plaintiff was 35). 90 Wn.2d 395, at 397-401.

In *Gross*, the Appellate court cited RAP 2.5(a)(2) for its ability to reach a motion to dismiss on appeal. *Id.* at 400. The court wrote:

> Respondent is thus not precluded from raising appellant's failure to establish he is within the protected class. Inasmuch as appellant failed to establish the facts upon which relief can be granted, dismissal of his complaint for age discrimination under RCW 49.60 was not error.

*Id., emphasis added.* *Gross* was not a summary judgment motion, and its citation is inapt.

*Gross* is even more inapt for the Respondent to cite, in that in *Gross* there was deference to the administrative rule-making that construed the statute at issue. 90 Wn.2d at 399. ("And these regulations are entitled to considerable deference since they are the construction of a statute by those whose duty it is to administer its terms.")

The Respondent raises *Gross* to mislead the court as to the proper standard of review. *Gross* was a motion to dismiss for failure to state a claim, and the *Gross* case involved deference to administrative rules that construed the statute which underlay the claim. *Gross* is an entirely inappropriate citation for the Respondent to put before the court.

Review on summary judgment is, instead, *de novo* as to all facts. *Ranger Insurance v. Pierce County,* 164 Wn.2d 545, 552, 192 P.3d 886 (2008) (upholding reversal of summary judgment).

Respondent also misstates contract and tort law of Washington, as shall be outlined, below.

## II. Un-rebutted Arguments and Un-Addressed Issues

The College simply refused to address the case's fundamental issues in its *Response*, and Appellant should prevail on the un-rebutted claims.

### A. Statement of Issues in the Brief of Appellant

The *Appellate Brief* presented this *Statement of the Issues*:

> 1. Did the trial court apply the proper summary judgment standard, which requires the court to construe the facts against the moving party, when the court construed facts in favor of the moving party? (Assignment of Error 1.)
>
> 2. Should the trial court have applied the "Context Rule" of contract interpretation, which requires that all factors surrounding the agreement be considered, and which requires that such contextual facts be determined by the jury? (Assignment of Error 1.)
>
> 3. Should the trial court have ignored the post-signing period of revocation of the agreement at issue, a 10 day period during which the Plaintiff offered fresh consideration for additional Defendant promises in guarantee of the contract at issue? (Assignment of Error 1.)

4. Should the trial court have construed the boilerplate language of the contract at factual issue to not only recompense past wrongs in settlement, but to license Defendants to commit future wrongs against the Plaintiff, and should the trial court have construed the agreement to waive all of Plaintiff's future legal actions against all future wrongs committed by the Defendants against the Plaintiff? (Assignment of Error 1.)

5. Should the trial court, having interpreted the waiver provisions of the agreement at issue to waive all future legal action, have dismissed all non-contract causes of action? (Assignment of Error 1.)

6. Did the trial court err on June 20, 2008, in denying Plaintiff's CR 56(f) request for more time for discovery to meet Defendants' Motion for Summary Judgment, as the record clearly showed the reasons for the discovery schedule? (Assignment of Error 2.)

7. Did the trial court err on June 20, 2008 in denying Plaintiff's CR 56(f) motion, as the legal standard for granting more time under CR 56(f) had been met? (Assignment of Error 2.)

8. Did the trial court fail to apply the proper legal standard in granting Defendants' request for sanctions under RCW 4.84.185? (Assignment of Error 3.)

9. Did the trial court fail to properly find specific facts to support a finding under RCW

4.84.185 that Mr. Mason's claims were entirely without rational basis in law or fact? (Assignment of Error 3.)

10. Did the trial court err on June 20, 2008 in granting, in part, Defendants' motion to strike portions of Plaintiff's affidavits, as the stricken material was only offered to prove the actions directly witnessed by the declarants? (Assignment of Error 4.)

*Brief at pp. 3-4.*

The Respondent fails to address the sole basis of the trial court's decision – Pertinent to Issues 3-5. *Brief at pp. 20-23, 33-34, and passim.* The sole finding that led the trial court to reverse its initial dismissal of the College's summary judgment motion is this: That "[Craig Mason] promised to never sue him [Lee Thornton] again." *CP: 642.*

**B. Issues Omitted by Respondent from Its Brief**

The College's response brief provides a "Counterstatement of the Issues." *Response at pp. 2-3.* However, the Response brief entirely fails to address these issues (Issues Pertaining to Error 3-5):

3. Should the trial court have ignored the post-signing period of revocation of the agreement at issue, a 10 day period during which the Plaintiff offered fresh consideration for additional Defendant promises in guarantee of the contract at issue? (Assignment of Error 1.)

4. Should the trial court have construed the boilerplate language of the contract at factual issue to not only recompense past wrongs in settlement, but to license Defendants to commit future wrongs against the Plaintiff, and should the trial court have construed the agreement to waive all of Plaintiff's future legal actions against all future wrongs committed by the Defendants against the Plaintiff? (Assignment of Error 1.)

5. Should the trial court, having interpreted the waiver provisions of the agreement at issue to waive all future legal action, have dismissed all non-contract causes of action? (Assignment of Error 1.)

*Brief at p. 2.*

The Respondent never addressed these issues before the trial court, although Appellant had brought Issue 3 before the trial court. Issues 4 and 5 arose only after the trial court first ruled in favor of the Appellant, denying Respondent's summary judgment motion, and then later in the hearing at issue, the trial court reversed itself, and, *sua sponte*, provided the trial court's own theory that the release document at issue was a waiver by Mr. Mason of all future and subsequent wrongs committed by the Respondent against the Appellant. *Brief at pp. 20-23, 33-34, and passim.* Issues 4 and 5 were a result of the trial court construing facts improperly against the non-moving party, and were a result of the trial court inventing this legal argument of future waiver and license to commit future torts that the Respondent had never made. *Id.* And yet, without these arguments, which

Respondent does not defend in its *Response*, the Respondent's CR 56 motion would have been denied. *Id.*

As arguments regarding Issues 3-5 have not been addressed by the Respondents in the Response brief, the Appellant's positions should prevail as un-rebutted, summary judgment should be reversed, and the case remanded for a new case scheduling order and a new trial date.

**C. In Un-rebutted Arguments: The Facts Were Wrongly Construed**

The Appellate Brief drew upon the Verbatim Report of Proceedings, found in the Clerk's Papers, and cited thereto to present the following summary of the oral hearing (emphasis added):

> Turning to CBC's Motion for Summary Judgment, counsel for CBC, Paul Triesch, declined to present oral argument in detail, and deferred to his pleadings. *CP: 611-612.*
>
> Mr. Mason then presented the case law of *T.R.A. v. Flowers*, 127 Wn.App. 13, 111 P.3d 1192 (2005) and provided courtesy copies. *CP: 612-613.* Mr. Mason then noted that "it's well established in Washington law that oral contracts – even oral contracts that modify or contradict written partial integrations, especially boilerplate language in the partial integrations...raise questions of fact." *CP: 613.*
>
> Further, Mr. Mason made clear that "but for" the oral terms, he would have never agreed

to the contract. *CP: 613-14.* Both sides knew that the written document was a partial integration. *CP: 614.* Mr. Mason presented, based upon filed affidavits, that the writing at issue was always understood to be a partial integration, and that there was a "meeting of the minds" to this effect, and as to the terms of the agreement. *CP: 614.*

Mr. Mason noted that under the common law of Washington the "total agreement is an issue of fact." *Id.* Mr. Mason noted that affidavits creating the issue of fact on this account had been submitted to the court. *Id.* These points of law were repeated clearly. *CP: 615.*

In reply, Mr. Triesch, for CBC, construed the facts in favor of the moving party and argued that the agreement was a total integration. *CP: 616-17.*

The court then asked Mr. Triesch to distinguish *T.R.A. v. Flowers. CP: 617.*

A discussion of *T.R.A. v. Flowers* commenced between all present. *CP: 617-623.*

The court then told Mr. Mason he did not need to argue any further, that Mr. Mason had won, and that CBC's summary judgment motion would be denied. *CP: 623.*

Mr. Triesch then again construed the facts in favor of CBC, the moving party, arguing that

the writing was a total, not partial, integration. *CP: 623-627.*

Discussion of *T.R.A. v. Flowers* resumed. *CP: 628-630.* The court then indicated that it had wanted to grant CBC's summary judgment motion at the outset of the proceeding, or sooner. *CP: 630.* The court then decided to allow supplemental briefing. *Id.*

Mr. Triesch then construed Mr. Mason's suit as one in tort, and argued that *T.R.A. v. Flowers*, as a contract case, offered Mr. Mason no relief regarding torts, since tort actions were prohibited by the partial integration at issue. *CP: 631-33.*

Mr. Mason then summarized his reliance upon the Context Rule of Washington law in entering into the agreement at issue. Without the case law of *Berg v. Hudesman,* and its progeny, reaffirming that boilerplate could not thwart real agreements, and without the Washington common law thus protecting him from being defrauded, Mr. Mason would not have entered into the partially integrated agreement with CBC. *CP: 633-635.*

The trial court then undertook, on its own, to distinguish *T.R.A. v. Flowers*, construing facts and law against Mr. Mason, and announced it would be ruling in favor of CBC on summary judgment. *CP: 635-638.*

Mr. Mason then reminded the court that there was a real factual dispute that the writing

was never a total integration. *CP: 639.* Mr. Mason reminded the court that the parol evidence rule does not apply to subsequent agreements (e.g., the agreements made during the period of revocation, supra), and again addressed the "Context Rule." *CP: 639 & 640.*

Mr. Mason reviewed the law of third party beneficiaries and the law of fraudulent inducement. *CP: 640.* As to credibility, Mr. Mason reminded the court that credibility is a jury question. *CP: 641.*

Concluding its summary judgment ruling, the court, having construed the facts in favor of the moving party, and holding that the agreement at issue was a total integration, the court then construed the waiver provision to mean: "You promised to never sue him [Lee Thornton] again." *CP: 642.* This was apparently used as the basis to dismiss all other torts and contract claims, and to impose sanctions against Mr. Mason. *CP: 644.*

Mr. Mason then noted to the court, that even if the boilerplate of the partial integration was construed to be a complete integration, that "certainly no such language could be a license for future wrongs." *CP: 644.* Mr. Mason concluded the record by restating that under Washington common law, he had created genuine issues of material fact. *CP: 645.*

*Brief at 19-22.*

All three of the un-rebutted issues, Issues 3-5 from the Appellate Brief, relate to the trial court's creation of the Respondent's license to commit future harm against Mr. Craig Mason with legal impunity.

This argument (that Appellant Mason licensed the College to commit future harm) was not made by the Respondent in the court below, and it is not advanced by the Respondent now. The trial court construed the facts, erroneously, against the non-moving party (the Appellant), throughout, and then, when the trial court invented the Respondent's right to commit future harms, it went beyond construing facts in favor of the moving party, and the trial court rose to inventing facts in favor of the moving party (the Respondent College).

The Respondent does not take any steps to rebut this argument or to provide any contrary facts. The trial court's summary judgment motion should be reversed.

**D. Un-rebutted and Un-Addressed Issues: Problems at Law**

**1. Issue 3: Post-signing agreements, and Period of Revocation Additional Agreements.**

Post-signing modifications can be made under Washington law, and are questions of fact. Such modifications are analyzed under the Context Rule. *See e.g., Pacific Northwest Group v. Pizza Blends, Inc.*, 90 Wn.App 273, 277-78, 951 P.2d 826 (1998) ("A paradox of the common law is that a contract clause prohibiting oral modification is essentially unenforceable because the clause is itself subject to

oral modification."), *and see Consolidated Electric Dist. Inc .v Gier,* 24 Wn.App 671, 677-78, 602 P.2d 1206 (1979) (Summary judgment reversed because debtor's sworn testimony that the creditor waived the guaranty raised a question of material fact as to whether the guarantee was orally terminated).

In this instance, Mr. Mason had a period of revocation, and his right to revoke provided additional consideration for the additional guarantees he received. *See the CP cited in Brief at pp. 5-9, en passim.*

**2. Issues 4 and 5: A Waiver Must Be Voluntary and Intentional Waiver of a Known Right**

A "waiver is the 'intentional and voluntary relinquishment of a known right.' *Panorama Residential Protective Ass'n v. Panorama Corp of Wash.*, 97 Wn.2d 23,28 640 P.2d 1057 (1982), *cited in Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 426, 191 P.3d 866 (2008).

The waiver of Appellant Mr. Mason's rights to file suit for future claims: (a) was never in the contemplation of the parties, and (b) was not raised by either party until the trial court, *sua sponte*, invented this waiver.

Nothing in the record supports the trial court's grant of summary judgment based upon Respondent College receiving a license to commit future torts against the Appellant with legal impunity.

## III. Proper Standard of Review (Contra Respondent's Brief)

### A. Review is *De Novo*

As the proper standard of review, the appellate court stands in the same position as did the trial court, and determines for itself whether there are genuine issues of material fact. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). "We review an order of summary judgment de novo and perform the same inquiry as the trial court." *Mulcahy v. Farmers Ins. Co. of Wash.*, 152 Wn.2d 92, 95 P.3d 313, 316 (2004) (emphasis added).

### B. CR 56 Requires Facts to be Construed AGAINST the Respondent

In a summary judgment motion, all facts are to be construed against the moving party, and the moving party has the burden of showing that no reasonable jury could possibly decide in favor of the non-moving party. *Ranger Insurance v. Pierce County,* 164 Wn.2d 545, 552, 192 P.3d 886 (2008). The trial court should have construed the facts in favor of Mr. Mason, and against Columbia Basin College. "When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party...." *Id.* (emphasis added).

The law for determining if summary judgment is appropriate was not followed by the Respondent, nor by the trial court, in this case.

**C. Meaning of Standard of Review: To Grant Summary Judgment, No Reasonable Jury Could Possibly Find for Appellant**

The standard for granting a summary judgment motion sets a high bar. Summary judgment is appropriate only if no reasonable jury could find for the Appellant. "[C]onstruing the evidence in the light most favorable to the nonmoving party, the court asks whether a reasonable jury could find in favor of that party." *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 767-68, 776 P.2d 98 (1989).

If there are genuine issues of material fact, then the case should be allowed to proceed, and dismissal on summary judgment is erroneous. "If reasonable minds can reach different conclusions, summary judgment is improper." *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 30, 959 P.2d 1104 (1998) (emphasis added) (citing *Kalmas v. Wagner*, 133 Wn.2d 210, 215, 943 P.2d 1369 (1997)). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation," *Id.*, *citing*, *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 618 P.2d 96 (1980), *cited in Bort v. Parker*, 110 Wn. App. 561, 569, 42 P.3d 980 (2002). Summary judgment must be denied if a right of recovery is indicated under any provable set of facts. *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964). The trial court should have construed the facts in favor of Appellant Mr. Mason, and against Respondent Columbia Basin College, but the trial court did the opposite. Given that the trial court construed the facts against the non-moving party, instead of against the

moving party, the summary judgment order should be reversed.

**D. Respondent's Misleading Standard of Review: Citing *Gross***

The Respondent's brief attempts to mislead the court into adopting a deferential standard of review toward the trial court's decision. *Response at p.6.* The Respondent misleadingly cites *Gross v. Lynwood*, 90 Wn.2d 395, 583 P.2d 1197 (1978) to argue that review of summary judgment should be deferential to the trial court. *Response at p. 6.*

*Gross v. Lynwood* was a Motion to Dismiss for failure to state a claim, and the basis of the dismissal was the statutory construction of RCW 49.44.090 (setting a minimum age of 40 to be a victim of age discrimination, where plaintiff was 35). 90 Wn.2d 395, at 397-401.

In *Gross*, the Appellate court cited RAP 2.5(a)(2) for its ability to reach a motion to dismiss on appeal. *Id.* at 400. The court wrote:

> Respondent is thus not precluded from raising appellant's failure to establish he is within the protected class. Inasmuch as appellant failed to establish the facts upon which relief can be granted, dismissal of his complaint for age discrimination under RCW 49.60 was not error.

*Id.*, emphasis added. *Gross* was not a summary judgment motion, and its citation is inapt, and misleads the court.

*Gross* is even more inappropriate authority for Respondent to cite because in *Gross* there was deference to the administrative rule-making that construed the statute at issue. 90 Wn.2d at 399. ("And these regulations are entitled to considerable deference since they are the construction of a statute by those whose duty it is to administer its terms.")

*Gross* is an erroneous citation in that *Gross* was: (1) a motion to dismiss for failure to state a claim, and (2) the *Gross* case involved deference to administrative rules that construed the statute which underlay the claim. Respondent's citation to *Gross* case misleads the court.

**E. RCW 4.84.185: *De Novo* Review of the Facts – *Gross* Revisited**

The Respondent cites the "abuse of discretion" standard for RCW 4.84.185. *Response at pp. 6-7.* However, in *de novo* review, all facts are up for review by the Appellate Court, and therefore deference to the facts underlying an award of RCW 4.84.185 fees would be grossly inconsistent with an appeal on summary judgment. *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964). (Summary judgment must be denied if a right of recovery is indicated under any provable set of facts).

The Respondent, again, as with its citation to the *Gross* case, tries to import deferential standards of review into a *de novo* review process. *See, e.g., Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 91-92, 838 P.2d 111 (1992) (to use the wrong legal standard to award RCW 4.84.185 fees is abuse of discretion, award reversed under RCW 4.84.185).

For Mr. Mason to prevail in his summary judgment appeal, is for Mr. Mason to also prevail on the RCW 4.84.185 claim. But the reverse is not necessarily the case, since rational arguments can lose on summary judgment. *See, e.g., Legal Foundation v. TESC*, 44 Wn. App. 690 (1986).

In *de novo* review, all facts are before the Court of Appeals.

**F. Application of the Proper Standard of Review to Summary Judgment**

Appellant does not here seek to recapitulate the entire Brief of Appellant. Only the issue of a partial integration of a total agreement is addressed in the next section, below. Had the trial court construed the facts in favor of Mr. Mason, then the "sale of tenure" agreement would have been properly seen as a *partial integration* of a *total agreement* that included oral terms. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995) (All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party). Summary judgment should have been denied on these grounds alone.

**1. Application of Law to Factual Issues**

Returning to the proceedings at oral hearing, previously discussed, even this small excerpt shows that the proper summary judgment standard was not followed.

> Further, Mr. Mason made clear that "but for" the oral terms, he would have never agreed to the contract. *CP: 613-14.* Both sides knew that

> the written document was a partial integration. *CP: 614.* Mr. Mason presented, based upon filed affidavits, that the writing at issue was always understood to be a partial integration, and that there was a "meeting of the minds" to this effect, and as to the terms of the agreement. *CP: 614.*
>
> Mr. Mason noted that under the common law of Washington the "Total Agreement is an issue of fact." *Id.* Mr. Mason noted that affidavits creating the issue of fact on this account had been submitted to the court. *Id.* These points of law were repeated clearly. *CP: 615.*
>
> In reply, Mr. Triesch, for CBC, construed the facts in favor of the moving party and argued that the agreement was a total integration. *CP: 616-17...* The court then told Mr. Mason he did not need to argue any further, that Mr. Mason had won, and that CBC's summary judgment motion would be denied. *CP: 623.*

*Brief at 19-20.*

Initially, the trial court did properly apply summary judgment standards, and ruled that the Respondent's summary judgment motion would be denied. *Nothing about these factual allegations has changed.* Genuine issues of material fact were found to exist by the trial court, and should be found again by the Court of Appeals, since they do exist.

**2. Application of Non-Alleged Facts as the Trial Court Created a Waiver For the Respondents for Future Torts.**

The alleged facts -- created by the trial court to allow Respondent a license for legal impunity to commit future torts -- were not alleged by the Respondent, and the Respondent has not defended them. *See discussion of Issues 3-5, supra.* These allegations were never before the trial court.

In order to grant the Respondent's summary judgment motion, (a) the trial court had to reverse its own initial construction of facts in favor of the non-moving Appellant, and then (b) the trial court had to invent for the Respondent a license to commit future wrongs with legal impunity.

To review, the summary of the hearing at issue resumes with the court's reasoning that led it to reverse its initial denial of Respondent's summary judgment motion (emphasis added):

> The court then told Mr. Mason he did not need to argue any further, that Mr. Mason had won, and that CBC's summary judgment motion would be denied. *CP: 623...*
>
> The trial court then undertook, on its own, to distinguish *T.R.A. v. Flowers*, construing facts and law against Mr. Mason, and announced it would be ruling in favor of CBC on summary judgment. *CP: 635-638.*
>
> Mr. Mason then reminded the court that there was a real factual dispute that the writing

was never a total integration. *CP: 639.* Mr. Mason reminded the court that the parol evidence rule does not apply to subsequent agreements (e.g., the agreements made during the period of revocation, supra), and again addressed the "Context Rule." *CP: 639 & 640.*

Mr. Mason reviewed the law of third party beneficiaries and the law of fraudulent inducement. *CP: 640.* As to credibility, Mr. Mason reminded the court that credibility is a jury question. *CP: 641.*

Concluding its summary judgment ruling, the court, having construed the facts in favor of the moving party, and holding that the agreement at issue was a total integration, the court then construed the waiver provision to mean: ***"You promised to never sue him [Lee Thornton] again."*** ***CP: 642.*** This was apparently used as the basis to dismiss all other torts and contract claims, and to impose sanctions against Mr. Mason. *CP: 644.*

Mr. Mason then noted to the court, that even if the boilerplate of the partial integration was construed to be a complete integration, that "certainly no such language could be a license for future wrongs." *CP: 644.* Mr. Mason concluded the record by restating that under Washington common law, he had created genuine issues of material fact. *CP: 645.*

*Brief at 19-22.*

The trial court persisted with its conclusion that: "[Appellant] promised to never sue him [Lee Thornton] again." *Id.* and *CP: 642.* Having construed the release as a total integration (thus construing the facts in favor of the moving party), the trial court then, *sua sponte*, created a legal theory that the contract at issue created a license allowing Respondent to commit future torts against the Appellant Mr. Mason with legal impunity. *Brief at 20-22.*

### 3. Summary Judgment Was Erroneously Granted

From the foregoing, it is clear that facts were construed in favor of the moving party, and therefore in violation of the proper legal standards. Under proper application of the law of Washington, the trial court should be reversed, and the Respondent's summary judgment motion should be denied.

## IV. Review of Applicable Washington Law, As Applied to Respondent's Arguments

The law of summary judgment has already been reviewed, supra. This section will revisit the applicable laws of contract, tort, and RCW 4.84.185, and address Respondent's legal arguments.

Contract law was briefed by the Appellant, previously. *See Brief at 27-34.* That law will be relied upon, and supplemented, and policy ramifications will be discussed, below. First, Respondent's problems of factual allegations not cited to the record must be addressed, and then, the Respondent's arguments are clarified, with legal argument following.

**A. Respondent's Factual Problems**

Respondent has no citations to the record, as he could not, in the first full paragraph of *Response, p. 7.* RAP 10.3(a)(5). The last sentence on *Response, p. 12*, is not only without citation to the record, but is false, given declarations filed by Appellant. *See CP at CP: 74, 233-238, 249-53, 254-57, 271-294, 403-07, 337-400 and all CP sited in Brief pp. 5-16.* The first sentence of the first full paragraph of *Response, p. 19* has no foundation in the record, nor does the last sentence of that paragraph. The first sentence of the final paragraph in *Response, p. 19*, is also not only without citation to the record, but is false. *See CR 56(f) Declaration discussion in Brief at pp. 40-42, and CP sited therein.*

**B. Structure of Respondent's Argument**

In *Response section V.B., the Respondent addresses* Third Party Beneficiaries. The Respondent relies upon its facts without basis in the record on this section, and then presents incomplete legal authority. *Response, at p. 7.* The Respondent then construes its facts in its own favor, and avoids the Appellant's specific argument that the Appellant Mr. Mason specifically bargained for the professional safety of the third-parties at issue. In its *section V.C.*, the Respondent construes the facts about the integration clause in its own favor, and then uses this self-serving factual interpretation to "prove" the integration. *Response at pp. 8-11.* Then, in its *section V.D.*, Respondent re-approaches third-party beneficiaries, and further construes the facts in its own favor, using its allegedly self-proving integration clause to write, "The separation agreement unequivocally shows that

there are no third party beneficiaries." *Response at p. 12.* Again, the Respondent ignores the record, and its duty under CR 56. Next, in its *section V.E.*, the Respondent further construes facts in its favor to argue that there were no special relationships in play. *Response at pp. 13-15.* Appellant has created extensive issues of fact to the contrary. *See Brief at pp. 5-16 and pp. 36-37.* Respondent's *section V.F* again addresses attorneys fees. *Id. at 15-16.* And section V.G addresses Appellant's CR 56(f) motion. *Response at pp.17-19.*

The Respondent consistently construes facts against the non-moving party (Appellant) and in some cases alleges "facts," without citation to the record, violating RAP 10.3(a)(5). Finally, the statements of law are very incomplete, when they are not clearly erroneous.

**C. REPLY to Respondent's Arguments**

**1. Third Party Beneficiaries – REPLY to *Response Sections V.B* and *V.D.***

The Respondent College relies upon alleged facts not in the record, and then refuses to address the case law already provided. *See Brief* at pp. 34-36, citing *Tex Enters*, 149 Wn.2d at 213-214. *See also, e.g., Burke & Thomas, Inc. v. Int'l Org. of Masters, Mates & Pilots*, 92 Wn.2d 762, 767, 600 P.2d 1282 (1979) (holding that 'creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract'), and for another statement of the general law, on different facts, *see, e.g., Coast Trading v. Parmac, Inc.*, 21 Wn. App. 896, 587 P. 2d 1071 (1978). See, also, e.g., *Haberman v.*

*WPSS*, 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987) ("Thus, while a duty in a fraud case may be owed by a defendant to plaintiffs in privity, a fiduciary relationship, or a limited class of persons, a duty may also arise to those third persons whom the defendant intends or has reason to expect will receive the information, especially in a business transaction where a defendant has knowledge necessary to prevent misrepresentation, or facts basic to the transaction where the plaintiff would reasonably expect disclosure").

The Respondent's position is simply untenable as policy and as law. If there are no third-party beneficiary contracts, how can an employer contract insurance for his employees, or a spouse for another spouse? The Respondent's position is simply not a credible account of the law, and it is a question of fact that Mr. Mason contracted for the benefit of Mr. Mathesius, Mr. Arshad, and Mr. Wakeman.

**2. *Berg v. Hudsman* and the Context Rule – REPLY to *Response Section V.C.***

**a. *Berg v. Hudesman:* Context Rule Applies, Even if the Writing at Issue is NOT Ambiguous -- Contract Terms are Questions of Fact**

The Washington State Supreme Court clarified the common law of contract interpretation in 1990, in *Berg v. Hudesman,* 115 Wn.2d 657, 801 P.2d 222 (1990). The *Berg* court made clear that the task of the court was to get to the actual agreement. As part of making certain that the actual agreement is reached, no ambiguity of language is necessary to raise the following question: What was the complete objective

agreement, including the unwritten terms? The *Berg* court states:

> We thus reject the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible. Cases to the contrary are overruled.

*Berg v. Hudesman,* 115 Wn.2d 657, 801 P.2d 222 (1990).

A recent case strongly restated the approach of Berg:

> The meaning of contract provisions is a mixed question of law and fact because we ascertain the intent of the contracting parties "by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties." Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting Stender v. Twin City Foods, Inc., 82 Wn.2d 250, 510 P.2d 221 (1973)).

*Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 425, 191 P.3d 866 (2008) (emphasis added). *See also, Kelly Springfield Tire Co. v. Faulkner*, 191 Wa. 549, 554-556, 71 P. 2d 382 (1937) (A contract could be orally modified despite a contractual prohibition on such modifications because it was settled law that "...a contract may be modified or abrogated by the parties thereto in any manner they choose, not withstanding

provisions therein prohibiting its modification or abrogation except in a particular manner," at 556).

Even the Respondent recognizes that parol evidence is allowable if fraud is alleged. *Response at p. 10.* That admission by the College is sufficient to prevent summary judgment, since fraud was specifically pled in the complaint. *CP: 470-71*

**b. Meaning of *Mutual of Enumclaw*, 164 Wn.2d at 425 – Contract Terms are Questions of Fact.**

As a "mixed question of law and fact" the terms of a contract are jury questions. *See, e.g., Scott Galvanizing, Inc., v. Northwest EnviroServices*, 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993). As the *Mutual of Enumclaw* court noted (emphasis added):

> Where the facts are undisputed, such as where the parties agree that the contract language controls and there is no extrinsic evidence to be presented, courts may decide the issue as a matter of law.

*Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d at 425. Here, Mr. Mason disputes the facts, and so jury questions exist, by legal definition.

**c. Application of *Mutual of Enumclaw*: Disputed Facts**

The facts of this case are disputed, and therefore there is a question of fact for the jury. The facts in dispute need to be construed in favor of the non-moving party. Summary judgment was improperly granted. *Id.*

**3. Special Relationships – REPLY to *Response Section V.E.***

The law is clear that bargaining in a special relationship of confidence and trust, or any other special relationship, leaves the harmed party a lower threshold to cross to show the liability of the one who misled him. *See, e.g., Colonial Imports v. Carlton Northwest*, 121 Wn.2d 726, 853 P.2d 913 (1993) *and Van Dinter v. Orr*, 157 Wn. 2d. 329 (2006).

**a. Special Relationship Case Law: Moral, Social and Personal Bases**

A claim for fraud may be based on failure to disclose a material fact when there is a duty to disclose because of the nature of the parties' relationship. *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 732-33, 853 P.2d 913 (1993). As the *Colonial* court noted:

> The duty to disclose in a business transaction arises if imposed by a fiduciary relationship or other similar relationship of trust or confidence or if necessary to prevent a partial or ambiguous statement of facts from being misleading.

*Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d at 731-32.

It is long-standing in Washington law that friendship can be the basis of a special relationship, or other personal ties. The *Salter* court wrote:

> In the case of *Schweickhardt v. Chessen*, 329 Ill. 637, 649, 161 N. E. 118, the court said:
>
> "A fiduciary relation is not limited to cases of trustee and *cestui que trust*, guardian and ward, attorney and client, or other recognized legal relations, but it exists in all cases where confidence is reposed on the one side and a resulting superiority and influence on the other side arises therefrom. *The origin of the confidence is immaterial. It may be moral, social, domestic or merely personal.*" (Italics ours.)

*Salter v. Heiser*, 36 Wn.2d 536, 551, 219 P.2d 574(1950)

**b. Special Relationships are Questions of Fact for the Jury**

As the *Liebergesell* court noted, no matter what relationships exist as a matter of law exist, fiduciary relationships can arise as a matter of fact (bold emphasis added, italics in original):

> A fiduciary relationship arises as a matter of law between an attorney and his client or a doctor and his patient, for example. But a fiduciary relationship can also arise *in fact* regardless of the relationship *in law* between the parties. *Salter v. Heiser*, 36 Wn.2d 536, 550-55, 219 P.2d 574 (1950).
>
> A confidential or fiduciary relationship between two persons may exist either because of the nature of the relationship between the

parties historically considered fiduciary in character; *e.g.*, trustee and beneficiary, principal and agent, partner and partner, husband and wife, physician and patient, attorney and client; or the confidential relationship between persons involved may exist in fact. *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356-57, 467 P.2d 868 (1970). *See also* Restatement of Contracts § 472, comment *c* at 898 (1932) ("A fiduciary position . . . includes not only the position of one who is a trustee, executor, administrator, or the like, but that of agent, attorney, trusted business adviser, and indeed any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former.").

Whether such a fiduciary relationship existed in fact in this case depends on the **development of factual proof**....

**Friendship seemed a determinative element** under the facts of *Gray v. Reeves*, 69 Wash. 374, 376-77, 125 P. 162 (1912): "A point is made that Mr. Gray was a shrewd and successful business man and ought not to have been misled by promises that, when revealed in the courtroom, seem to be unreasonable. But in this appellants have overlooked an element which disarms caution; that is, friendship. . . . The impulse that leads men to trust those in whom they have confidence cannot be ignored by the courts. Reputation for integrity or for knowledge of a given subject would be worth nothing if its possessor could not assume that

> others would believe in him or accept his opinion."

*Liebergesell v. Evans*, 93 Wn.2d 881, 890-92, 613 P.2d 1170 (1980).

Mr. Mason presented clear evidence that his friendship with Lee Thornton was why he chose to leave CBC, rather than work to fire Lee Thornton for his turn toward corruption. *Brief, pp. 15-16.* Lee Thornton intimately knew that Mr. Mason's integrity was on the line in that Mr. Mason could not leave CBC without assuring the working condition safety of professors Mathesius, Arshad, and Wakeman. *CP: 436-440, 465, and Brief: 5-16.* The facts of the special relationships in this case are jury questions, and summary judgment was granted in error.

**c. The Context Rule and Special Relationships: *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004)**

The whole of contract law, in a case such as this, requires a careful factual exploration, about which Mr. Mason has set out facts sufficient to have a jury investigate and determine. As the *Adler* court wrote:

> To interpret the meaning of a contract's terms, Washington courts employ the context rule. Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). The context rule requires that we determine the intent of the parties by viewing the contract as a whole, which includes the subject matter and intent of the contract, examination of the circumstances surrounding its formation, subsequent acts and conduct of

> the parties, the reasonableness of the respective interpretations advanced by the parties, and statements made by the parties during preliminary negotiations, trade usage, and/or course of dealing25 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE, CONTRACT LAW AND PRACTICE § 5.5 (1998).

*Adler v. Fred Lind Manor*, 153 Wn.2d 331, 351-52, 103 P.3d 773 (2004). Mr. Mason and CBC President Thornton had a long course of dealing that made it reasonable for Mr. Mason to trust Thornton. The fraud, misrepresentations, and breaches of this trust are all jury questions.

### 4. CR 56(f) – REPLY to *Response Section V.F.*

Appellant stands on the facts and arguments in the Brief, and objects to Respondent's allegations of facts not in evidence, and rejects the College's proposition that there is any evidence that Mr. Mason had any additional time to perform discovery ahead of the discovery schedule.

## V. Policy Implications for Settlement Agreements of Trial Court's Invention of Waiver as License to Commit Future Torts

The trial court was insistent that there was *one factual finding* that led the court to reverse its initial denial of summary judgment, and to impose terms. That one finding is that "[Craig Mason] promised to never sue him [Lee Thornton] again." *CP: 642*. It was a jury question whether the writing at issue was a total or partial integration, but after the trial court

invaded the realm of the jury and found a total integration in the agreement, the trial court offered an interpretation of that agreement that was never in the contemplation of the parties. The trial court then used this construction of facts never alleged to dismiss Mr. Mason's claims for all wrongs the College committed after November, 2003.

The policy implications of this ruling are as catastrophic as its impact on the law.

**A. Law of Settlement Agreements**

Settlement agreements are contracts, and under Washington law, Mr. Mason had the right to revive his prior, "settled" tort claims after CBC breached the agreement by harming the protected third-parties. *See, e.g., Rosen v. Ascentry Technologies*, 143 Wn.App. 364, 177 P.3d 765 (2008). Nonetheless, it is clear from the record that even though he had the right to file for those past (pre-November 2003) wrongs, Mr. Mason never filed suit against the College for past wrongs. When the College breached the November of 2003 agreement (by attempting to fire Matt Mathesius and Farhad Arshad), Mr. Mason, under Washington law, had the right to revive the prior tort claims which formed the basis of the partially integrated settlement agreement. This is settled law. *Id.*

**B. Policy of Settlement Agreements**

The trial court's ruling creates a legal nightmare for settling plaintiffs. A woman could settle a sexual harassment suit for being fondled against her will, and then, under the law on appeal in this case, the harassment settlement could be treated by her boss as

a license to fondle her for life with legal impunity. A toxic waste violator could settle its tort for pollution of the water supply, and then present its settlement agreement as a waiver of all of its future pollution – as a license to dump toxic waste in perpetuity. The trial court's position is absolutely untenable.

## VI. Conclusion and Relief Requested

On multiple valid bases, each sufficient in itself, Appellant Craig Mason respectfully requests that this case be remanded for a new case scheduling order, and a new trial date, with ample discovery time.

Respectfully Submitted,

_____

Craig A. Mason, Appellant Pro Se
WSBA#32962

# APPENDIX

## Table of Cases

### Washington Cases

*Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004), referenced at p. 28.

*Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 618 P.2d 96 (1980), referenced at p. 13.

*Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), reference at pp. 8, and 23-24.

*Bort v. Parker*, 110 Wn. App. 561, 42 P.3d 980 (2002), referenced at p. 13.

*Burke & Thomas, Inc. v. Int'l Org. of Masters, Mates & Pilots*, 92 Wn.2d 762, 600 P.2d 1282 (1979), referenced at p. 22.

*City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006), referenced at pp. 2, 11-12,

*Coast Trading v. Parmac, Inc.*, 21 Wn. App. 896, 587 P. 2d 1071 (1978), referenced at p. 22.

*Colonial Imports v. Carlton Northwest*, 121 Wn.2d 726, 853 P.2d 913 (1993), referenced at pp. 25-26.

*Consolidated Electric Dist. Inc .v Gier*, 24 Wn.App 671, 602 P.2d 1206 (1979), referenced at pp. 10,

*DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 959 P.2d 1104 (1998), referenced at p. 13.

*Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964), referenced at pp. 13 and 15.

*Flower v. TRA Industries,* 127 Wn.App. 13, 111 P.3d 1192 (2005), referenced at pp. 7-8, and 18.

*Gray v. Reeves*, 69 Wash. 374, 125 P. 162 (1912), referenced at p. 27.

*Gross v. Lynwood*, 90 Wn.2d 395, 583 P.2d 1197 (1978), reference at pp. 2-3, and 14-15.

*Haberman v. WPSS*, 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987), referenced at p. 22.

*Herron v. KING Broad. Co.,* 112 Wn.2d 762, 776 P.2d 98 (1989), referenced at pp. 12-13.

*Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 527 P.2d 1115 (1974).

*Kalmas v. Wagner,* 133 Wn.2d 210, 943 P.2d 1369 (1997), referenced at p. 13.

*Kelly Springfield Tire Co. v. Faulkner*, 191 Wa. 549, 71 P. 2d 382 (1937), referenced at p. 24.

*Legal Foundation v. TESC*, 44 Wn. App. 690 (1986), referenced at p. 15.

*Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980), referenced at pp. 26-27.

*McCutcheon v. Brownfield*, 2 Wn. App. 348, 467 P.2d 868 (1970), referenced at p. 27.

*Mulcahy v. Farmers Ins. Co. of Wash.*, 152 Wn.2d 92, 95 P.3d 313 (2004), referenced at p.12.

*Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 191 P.3d 866 (2008), referenced at pp. 11 and 24-25.

*Pacific Northwest Group v. Pizza Blends, Inc.*, 90 Wn.App 273, 951 P.2d 826 (1998), referenced at p.10.

*Panorama Residential Protective Ass'n v. Panorama Corp of Wash.*, 97 Wn.2d 23, 640 P.2d 1057 (1982), referenced at p. 11.

*Ranger Insurance v. Pierce County,* 164 Wn.2d 545, 192 P.3d 886 (2008), referenced at pp. 2, 4, 12,

*Rosen v. Ascentry Technologies*, 143 Wn.App. 364, 177 P.3d 765 (2008), referenced at pp. 29-30.

*Salter v. Heiser,* 36 Wn.2d 536, 219 P.2d 574 (1950), referenced at p. 26.

*Scott Galvanizing, Inc., v. Northwest EnviroServices*, 120 Wn.2d 573, 844 P.2d 428 (1993), referenced at p.24.

*Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995), referenced at p. 16.

*Tellevik v. 31641 W. Rutherford St.,* 120 Wn.2d 68, 838 P.2d 111 (1992), referenced at p. 15.

*Tex Enters., Inc. v. Brockway Standard, Inc.,* 149 Wn.2d 204 (2003), referenced at p. 22.

*Van Dinter v. Orr*, 157 Wn. 2d. 329 (2006), referenced at p. 25.

*Wilson v. Steinbach,* 98 Wn.2d 434, 656 P.2d 1030 (1982), referenced at p.13.

**STATUTES**

**RCW 4.84.185:**

4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

**RCW 49.44.090** (Washington discrimination cited in *Gross v. Lynwood*, 90 Wn.2d 395, 583 P.2d 1197 (1978), is not otherwise applicable to this case.)

**COURT RULES**

**CR 56:**

Rule 56. Summary judgment

(a) *For claimant* A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party* A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings* The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other

documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion* If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts

that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable* Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application

for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) *Form of order* The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

**RAP 10.3(a)(5)** (Cited at pp. 20 and 21, emphasis added.)

a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. **Reference to the record must be included for each factual statement.**

**RAP 2.5(a)(2)** *cited in Gross v. Lynwood*, 90 Wn.2d 395, 583 P.2d 1197 (1978), and is otherwise not applicable in this case.

## APPENDIX L

**Court of Appeals of the State of Washington, Division III**

**Ct. of Appeals Number: 273229**

**[Filed June 2, 2009]**

| | |
|---|---|
| Craig Mason, | ) |
| | ) |
| **Appellant,** | ) |
| | ) |
| vs. | ) |
| | ) |
| Columbia Basin College, Columbia Basin Board of Trustees, Lee Thornton, Rich Cummins, Meg Woods, and the marital community of Meg Woods and Rich Cummins, David Shaw and the marital community of David Shaw and Jane Doe Shaw, Deborah Meadows and the marital community of Deborah Meadows and Mike Grinnell, Ruben Lemos and the marital community of Ruben Lemos and Jane Doe Lemos, and Bill McKay and the marital community of Bill McKay and Jane Doe McKay, | ) |
| | ) |
| **Respondents.** | ) |

## Motion for Reconsideration

**Rule 17.3(a)/12.4**

To: Clerk of the Court:

1. IDENTITY OF MOVING PARTY

Craig Mason, "Appellant," asks for the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

Under RAP 12.4(a)-(c) the Appellant requests that the court reconsider its decision filed on May 14, 2009, which did not address any of the Appellant's facts, case law, or issues raised on appeal, including that the decision did not address misconstruction of the facts by the trial court in favor of the moving party, and in violation of CR 56. None of the factual or legal substance of the Appellant's Brief, Reply Brief, including citations to the record, was addressed. Only the conclusions of the Response Brief seemed to be presented in the decision. Appellant therefore requests that he have an opportunity to be heard, to have his issues on Appeal addressed, and that oral argument be held.

Appellant requests that the May 14, 2009 decision be withdrawn, and a full oral argument be heard, with 30 minutes on each side to address the significant issues of fact and law overlooked by the court in the May 14, 2009 decision.

## 3. FACTS RELEVANT TO MOTION

The entire citation to the record in the overlooked Brief and Reply Brief will not be recapitulated here, but citations to the record are extensive. The Reply Brief pointed out numerous ways in which the issues on appeal in the Appellant's Brief were un-rebutted in the Response; and yet the May 14, 2009 decision was conclusory, was contrary to facts in the record, and was logically inconsistent. The following is a list of the key erroneous fact-related elements in the decision of May 14, 2009:

a) Not one issue raised by the Appellant was addressed in the decision filed on May 14, 2009 in the context of construing the facts against the moving party (Respondent). Overlooking the entire appeal of the Appellant is a fundamental denial of due process and denial of the opportunity to be heard.

b) The primary issue was this: The facts in the court below were construed in favor of the moving party, and this misconstruction of the facts was not addressed or remedied in the decision of May 14, 2009. This is a fundamental deprivation of the Appellant's rights under CR 56, and the failure of the Court of Appeals to construe the facts against the moving party deprived the Appellant of a true *de novo* appeal. Likewise, related issues firmly rooted in established case law were not addressed or heard, especially as regards to allegations which create genuine issues of material fact under settled Washington case law.

c) *Contrary* to the decision of May 14, 2009, the primary issue was **not** this one issue of fact: "whether Mr. Mason has standing to complain about the school's

actions against other teachers." The issue was misinterpreted, and other causes of action were overlooked.

If explored as a matter of fact, construing facts in the record against the moving party, then genuine issues of fact exist about the partially integrated contract (had the facts been properly construed). And the issue of the oral modification for additional consideration, post-signing of the writing, was not addressed by the decision. And none of Mr. Mason's own torts, brought on his own behalf, were addressed by the trial court, nor by the decision of May 14, 2009, as is clear by the court's own statement of the issue as it addressed the decision.

d) The second most important issue was this: After misconstruing the facts, *the trial court (i) created a waiver, (ii) against public policy, (iii) never in the contemplation of either parties,(iv) and that the court-manufactured waiver was a license for the Respondent to commit future harms* (v) never contemplated by the parties. Even the Respondent conceded that issues such as fraud could not possibly be covered by any alleged waiver, and yet these issues, such as fraud, and other torts brought by Mr. Mason on his own behalf, were not addressed in the decision filed on May 14, 2009.

e) Facts cited in the record make out a prima facie case of fraud, creating genuine issues of material fact in support of the complaint, and yet fraud was not addressed in the May 14, 2009 decision, *nor* were other tort claims brought by the Appellant on his own behalf. Fraud was properly pled, with correct specificity, in the complaint, and that cause of action should survive.

f) Properly construed facts cited to the Clerk's Papers, in the Appellant's Brief and Reply Brief, showed genuine issues of material fact regarding whether either party treated the "retirement agreement" as a fully integrated settlement agreement. Yet this issue was not addressed by the decision of May 14, 2009. The Appellant's facts in the record were ignored by the decision, but, most importantly, the facts were not properly construed under CR 56.

g) The Appellant, "but for" the promise that no more illegal or abusive actions would occur against the three faculty listed, would not have entered the "retirement agreement." This term of the agreement was the fundamental consideration offered by the Respondent, without which the Appellant would never have agreed to depart from Columbia Basin College. The declarations of three persons, and the facts and circumstances, support this issue as a genuine issue of material fact. Even the Appellant's own sworn testimony is sufficient, by itself, under the cited case law of Washington, to create an issue of credibility, of fact, on this issue.

This genuine issue of material fact supports reversal on the contract law portion of the suit, and supports reversal on fraud, and supports reversal on the law of special relationships, and supports reversal in restitution, pled as an equitable doctrine in the complaint.

h) The second declaration of Matt Mathesius shows a basis for the defamation claim, and defamation was not addressed by the decision of May 14, 2009, nor by the trial court, except as the trial court constructed a

waiver for the Respondent to commit future harms with impunity. (This "waiver" was never contemplated by either party, and never argued by either party prior to the CR 56 hearing.) None of the torts brought by Mr. Mason on his own behalf were addressed in the decision of May 14, 2009.

i) The facts of special relationship were supported by proper evidence in the Brief and Reply Brief, and yet the law of special relationships was not addressed by the decision of May 14, 2009.

j) The Respondent failed to appear for oral argument, and the Appellant agreed to waive oral argument *only if* the court would address all the issues raised in the Appellant's Brief and Reply Brief. None of these issues were addressed, in fundamental denial of due process and opportunity to be heard. The decision of May 14, 2009 did not address the Appellant's issues, properly raised on appeal.

k) The facts of the Appellant showed that the Appellant relied upon a discovery cut-off date for July 30, 2008, in the case scheduling order. And the record clearly showed that the Appellant was going to use from the end of the academic year in June, 2008 until the discovery cut-off date to hold his depositions and to compel overdue responses to discovery requests. The Respondent's refusal to answer discovery was not considered regarding the Appellant's CR 56(f) motion; nor was the Appellant's crushing schedule through early 2008 (a long commute to teach on the Colville reservation, and helping with a trial that had been dropped at the last moment by a former employer) properly considered. The Appellant's reliance upon the

case scheduling order was reasonable and was not addressed in the May 14, 2009 decision.

l) The facts in the record regarding the admissibility of Exhibit B (the Farhad packet) were not addressed by the court. The Appellant had personally seen the packet, and had helped Mr. Arshad edit some of the documents, and to this extent it was not hearsay. It was the action of the Respondent that made Mr Arshad unavailable. And the Appellant was presenting the various documents for proper purposes. Other declarations in the record showed personal knowledge that Mr. Arshad distributed the packet to law firms in the Tri-Cities. Case number citation showed that a federal case resulted, which was settled. The Farhad packet was sufficiently verified for those evidentiary purposes for which it was submitted, and yet none of these facts or other rules of evidence were addressed in the decision of May 14, 2009. ER 803 and ER 804 arguments were not addressed at all in the decision of May 14, 2009.

m) The *docket summary*, which is stated not to be binding on the court, *contained only the Respondent's version of the issue on appeal*. The decision of May 14, 2009, did not meet the basic requirements of due process under the state and federal constitutions. The cited facts and appealed issues of the Appellant were overlooked or misapprehended in their entirety. Basic due process was not met by the decision of May 14, 2009.

4. GROUNDS FOR RELIEF AND ARGUMENT

***Berg Contract Law Section:***

a) The May 14, 2009 decision states: "Indeed, Mr. Mason does not point to any provision and claim it means other teachers were protected." *Decision at p.7, par.1.*

Argument: ***The contract is partially integrated and this "protection of colleagues term" is an oral term***. Under Washington case law, this is a question of fact. The May 14, 2009 decision begs the question. Mr. Mason created genuine issues of material fact that oral terms existed. If the facts were properly construed in Mr. Mason's favor, then it would be logically incoherent to compel Mr. Mason to find a written version of what Mr. Mason insists was an oral term by mutual agreement. This assertion within the decision is either a failure of logic, or a failure to construe the facts against the moving party.

Mr. Mason does point to the oral provision protecting teachers, and the Appellant has created a genuine issue of material fact on that topic. Mr. Mason asserts that the challenged term is in the agreement (it is just **not** in the written portion of the agreement). Mr. Mason never asserted this oral term was in the written portion of the total agreement. The decision of May 14, 2009, overturns the case law of Washington to deny that Mr. Mason created a genuine issue of material fact on this issue, on properly construed facts.

Competent evidence exists that the writing was never intended by *either party* to be a full and complete written integration, and therefore the parol evidence

rule does not apply. Further, additional oral modifications, subsequent to the signing, as a matter of logic and law, are **not** subject to the parol evidence rule. These are questions of fact. These are questions of credibility. They are not properly dismissed on summary judgment.

Any other decision amounts to a massive overruling of settled Washington case law, cited extensively in the Appellant's brief.

b) The May 14, 2009 decision states: "[Mason] produces no evidence in support of his position except his own vague statements." *Decision at p.7, par.2.* Nothing about Mr. Mason's statements are vague; the agreement was explicit, and was the core of the "basis of the bargain" of the agreement itself. Further, *Mr. Mason's subsequent decision not to revoke the agreement*, during the period of revocation, after signing, was a result of further exchange of additional consideration on oral terms that refreshed and intensified new guarantees that faculty members Mathesius, Arshad, and Wakeman would suffer no more abusive or illegal treatment. This foregoing of revocation *was fresh consideration for fresh guarantees.* The quote, above, about "vague statements" is conclusory language from the Respondent's brief, and is contradicted by the cited record. Genuine issues of material fact remain.

Nothing about Matt Mathesius having contemporaneously discussed and received these guarantees as a core basis of the bargain at issue is vague. Nothing about Mr. Mason testifying that he received and relied upon this core basis of the bargain is vague. The factual record is extensive, and properly

construed, genuine issues of material fact exist. Further, Mr. Mason testified that he explicitly relied upon the case law of Washington State, *Berg* and its progeny, to be certain that he could not be defrauded in this very way that the court now assists.

The case law of this state, and of this court, was the law upon which Mr. Mason relied as the Respondent told Appellant to "trust" that the ***term was in the total agreement***, even though it could not be written in the partial integration. The Respondent agreed, at the time of formation, at the time of signing, and subsequently during the period of revocation that the written document was not a total integration of the entire agreement. This is a question of fact. Equitable bases alone should lead the court to withdraw its decision of May 14, 2009, and to fully re-hear the matter.

Furthermore, these questions also show why discovery should not have been cut off short of the deposition of Lee Thornton, whom Mr. Mason still believes will not lie when directly questioned, under oath. The CR 56(f) motion should have been granted.

c) Under Washington law, credibility is for the trier of fact. The *Berg* and *Flowers v. TRA* legal standards are misapprehended in the May 14, 2009 decision, and the proper scope of the trial court is misconstrued in clear violation of the case law cited in Appellant's Brief and Reply Brief. (These cases also comprise the case law upon which the Appellant relied as the law of the land during the negotiations of this agreement.) These issues must go to the jury.

d) The May 14, 2009, decision again begs the question when it writes: "Mr. Mason was not a named beneficiary of any contract that CBC had with the other teachers; likewise, they were not beneficiaries of Mr. Mason's separation agreement with CBC." *Decision at end of p.7 to p.8.* ***These were oral terms of a partially integrated contract.*** This aspect of the decision misapprehends *Flowers v. TRA* and other case law protections against fraud. The named faculty were explicitly protected in terms of the contract agreed to by the Appellant and Respondent.

If a citizen calls the police to report that his dog has been stolen, and then the police demand to see the dog, and the citizen says, "I cannot show him to you, because he was stolen," and the police then call him a liar and assert that he never had a dog, the logical problem is obvious. That is the same problem in this case. Mr. Mason relied upon an oral term, of which he has been deprived and/or defrauded, and the Appellant deserves a fact-finding, credibility-testing trial on this issue.

It is not a proper defense to claim that he does not have the dog to point to. The Appellant has a strong basis in evidence that points to the "theft" (fraud) regarding this term of the contract at issue. (The decision also failed to discuss *Flowers v. TRA* or Appellant's other submitted case law.)

e) The May 14, 2009, decision concludes its *Berg* section of the decision by entirely ignoring the torts pled by Mr. Mason directly on his own behalf in his complaint. Appellant's facts and case law were entirely misapprehended or over-looked.

***CR 56(f) Section:***

f) The decision then states: "[Mason] undertook no discovery during this time period." *Decision at first sentence on p. 9.* Yet the record clearly shows that Mr. Mason had delivered four sets of interrogatories and requests for production to the Respondent, which they had refused to answer. The discovery schedule was adopted with the fact in mind that Mr. Mason could not begin holding depositions and motions until mid-June, 2008. The nature and factual value of the evidence sought was filed with Mr. Mason's CR 56(f) motion. The facts of the record flatly contradict this portion of the decision.

The facts of the record showed that the Appellant relied upon a discovery cut-off date for July 30, 2008, in the case scheduling order. And the record clearly showed that the Appellant was going to use from the end of the academic year in June, 2008 until the discovery cut-off date to hold his depositions and to compel overdue responses to discovery requests. The Respondent's refusal to answer discovery was not considered regarding the Appellant's CR 56(f) motion; nor was the Appellant's crushing schedule through early 2008 properly considered, even though this is part of the record cited, and in the Clerk's Papers. (Appellant had a long commute to teach on the Colville reservation, and had to help with a trial [Song v. J.C. Penny] that had been dropped at the last moment by a former employer, and the Appellant was suddenly and heavily burdened with the need to preserve that case against defense summary judgment motions throughout the 2007-08 academic year, prior to the March trial.) The Appellant's reliance upon the case

scheduling order was reasonable and was not addressed.

***Striking Exhibit B:***

g) The decision of May 19, 2009, did not address ER 803 and ER 804 arguments against striking this exhibit at all. The decision did not address which portions of the Exhibit had been properly authenticated under hearsay rules. The decision of May 19, 2009, simply did not address the Issues on Appeal of the Appellant across the board, including on these issues.

The Appellant's issues were overlooked.

***RCW 4.84.185:***

h) *Other torts brought by Mr. Mason on his own behalf were not addressed*. The only possible way the dismissal of these torts could be upheld was under the trial court's imputation that the agreement somehow included a blanket waiver of all future harms, including all future torts committed by the Respondent. Such a waiver, not in contemplation of the parties, cannot possibly exist as a matter of law. It is against public policy, and against the law of the State of Washington.

The other torts brought by Mr. Mason on his own behalf were not addressed, and the broad trial-court invented waiver, that would destroy all settlement agreements in the state by turning them into licenses to harm, was not addressed.

i) Those other torts, overlooked by the court, are sufficient to defeat RCW 4.84.185 sanctions.

***RCW 4.92.090 -Tortious conduct of state -- Liability for damages.***

j) RCW 4.92.090 reads (emphasis added): "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."

Nothing in this statute states that the State of Washington should be held to a standard of lesser liability, nor that the Appellant should have to leap a higher standard of evidence or law on summary judgment.

RCW 4.92.090 has not been properly applied. The advantages given the Respondent to date in this case are unimaginable were the defendant not the State of Washington.

The Appellant did not agree to forego oral argument, which was needed to explore the issues in this Motion for Reconsideration, unless all of the Appellant's issues were in fact addressed. Oral argument was obviously necessary, as the May 14, 2009, decision overlooks or misapprehends the entire presentation of the Appellant's case.

***Other Arguments – Substantial and Formal Justice:***

k) The Appellant's Reply Brief shows the numerous arguments overlooked by the Respondent, and which thus remain un-rebutted. The decision of May 14, 2009, is detrimental to the appearance of fairness and justice, as well as to its reality. A point-by-point, well-reasoned dismissal of Mr. Mason's appeal would still be disappointing to the Appellant, but would maintain the honor and dignity of the court, and would be legally acceptable as to due process.

The May 14, 2009 decision denies the Appellant of due process and of the opportunity to be heard, as it has the unfortunate appearance that only the Attorney General's Response Brief was read, and none of the facts cited in the Clerk's Papers were reviewed. The decision of May 14, 2009 too completely ignores the submitted record, citations to fact, and Appellant's legal arguments and authority. The entirety of Appellant's case has been overlooked or misapprehended. (The lack of oral argument, due to the Respondent's last-moment refusal to appear, is most likely the cause of this lack of due process.) Oral argument is needed.

The decision of May 14, 2009, should be withdrawn, completely argued (including the oral argument that had been avoided by Respondent), and all issues should be fully addressed. To do less is harmful to the appearance of fairness in the Court, as well as harmful to the state and constitutional due process rights of the Appellant.

***Civic Importance of a Full and Complete Opportunity to Be Heard:***

Judicial notice of the following should be taken: On the evening of May 14, 2009, the Appellant received an email regarding the immediate story that was to run in the Tri-City Herald, before he had received notice of the May 14, 2009 decision. Before Appellant could read the opinion, the story ran on May 15, 2009, titled *Ex-CBC instructor loses second round in suit against college*, written by Michelle Dupler. http://www .tri-cityherald.com/kennewick_pasco_richland/story/579342.html

In a case in which the Court of Appeals decision of May 14, 2009, was used to immediate rhetorical public purpose, with other cases pending, it is very important that the Appellant receive a full and complete opportunity to be heard. Some pending cases include: Copland v. CBC, Franklin Co. #08-2-50466-5. Bourama v. CBC, Benton Co. # 08-2-02554-1, and Sidebe v. CBC, Benton Co. #08-2-02554-1. RCW 4.92.90 should be applied to the Respondent across the board, and there should not be a double-standard which dispirits plaintiffs against the Respondent state institution.

***Request for a Full and Complete Opportunity to Be Heard:***

The Appellant respectfully requests the court to revisit the facts that were over-looked in the record, and over-looked because the facts were not properly construed. The Appellant also respectfully requests that the court appreciate that it is over-ruling decades of case law in this decision, on properly construed

facts, and it should do so openly, or it should reverse the trial court.

The Appellant also asks that the claims, including tort claims, brought on his own behalf, be recognized as having been ignored by the trial court and by the decision of May 14, 2009.

In total, the Appellant has not had a genuine opportunity to be heard, and due process has been fundamentally overlooked, to the detriment of the court, as well as to the detriment of the Appellant.

**Particularity in the Points of Fact and Law which Have Been Overlooked:**

Abbreviations: CP = Clerk's Papers. AB = Appellant's Brief. ARB = Appellant's Reply Brief.

**Fundamental Overlooked Legal Issue:** The facts were not construed against the moving party in the court below, and the May 14, 2009 decision does not remedy that error. The brief statements below draw the court's attention to additional overlooked or misapprehended issues of law or fact.

***Partial Integration Issue (Berg and progeny):***

**Overlooked Legal Issues:** (1) Under *Berg v. Hudesman* the task of the court is to get to the actual agreement. Mr. Mason did not try to add a term to the mutual understanding of the parties, but merely to enforce the mutual understanding of the parties. AB at 27. (2) To insist formalistically on a full integration, without exploring all of the facts and circumstances of the agreement, is a clear error of law. (3) *Diaz v.*

*National Car Rental* was overlooked, as was its clear rule that "Extrinsic evidence may be used whether or not the contract language is ambiguous." AB at 28. (4) The rule of the *Scott Galvinizing* case was overlooked by the May 14, 2009 decision, that the point is to get to the actual meeting of the minds. AB at 29-31.

**Overlooked Facts:** (1) *First Declaration of Matt Mathesius* at CP 235, lines 7-22, and CP 237-238. (2) *Declaration of Craig Mason*, at CP 318-331. (3) *First Declaration of Lori Mason* at CP 295-300. (3) *Plaintiff's Answers to Requests for Admission*, at CP 437-440. (4) Facts in the *Complaint* were also sworn to be true, at CP 453-475.

**Overlooked Legal Issue:** Credibility is a jury question. AB at 25. Appellant's allegations which require the court to go beyond the writing at issue cannot be settled as a matter of law. AB at 25. As the facts are pled and sworn, this case should proceed to trial.

***Post-Signing Additional Contractual Guarantees:***

**Overlooked Issues of Law:** (1) The law summarized in the *Pacific N.W. Group v. Pizza Blends* case was not addressed. AB at 32. The rule is that written agreements against oral modification are unenforceable, because they may be orally modified. AB at 32. (2) The rule of *Consolidated Electric* was also overlooked, to the same effect. AB at 32. In sum, there was a complete lack of due process on these legal issues, which were not heard or addressed in the May 14, 2009 decision.

**Overlooked Facts**: During the period of revocation in the agreement, fresh guarantees were made by the Respondent to prevent the Appellant Mason from revoking the agreement. *Declaration of Craig Mason*, at CP 318-331, and *Complaint* at CP 468. These facts were also raised at CP 38, 41, 42, 47, 298, 303, 307, 314, 318, 321-22, 330-31, 439, 440 and 487. AB at 33.

***Causes of Action Brought by Mr. Mason on His Own Behalf:***

May 14, 2009 decision: Entirely overlooked all causes of action brought by Mr. Mason on his own behalf:

**Overlooked Legal Issues:** (1) Mr. Mason's *Complaint* lists these additional causes of action: (a) Fraud, at CP 470, where it is specifically pled. (b) Breach of Special Relationship and the Covenant of Good Faith and Fair Dealing, at CP 471. (c) Intentional and Negligent Infliction of Emotional Distress, at CP 472. (d) Tortious Interference with Contract, at CP 472. (e) Defamation, at CP 473. (f) Restitution as an Equitable Doctrine, at CP 473. (g) Abuse of Process, at CP 473. The trial court did not address these claims at all, and they have also been over-looked by the May 14, 2009 decision. (2) The decision of May 14, 2009 does not affirm the trial court's mode of dismissing these causes of action brought by Mr. Mason on his own behalf; the trial court created a blanket license to harm from the imputed "waiver." AB at 33-34. Instead, the May 14, 2009, decision simply overlooks these issues entirely. This violates basic due process.

**Overlooked Facts:**

Defamation: (1) *Second Declaration of Matt Mathesius, Re: Slander of Craig Mason...* at CP 73-74. See CP 46 at *Plaintiff's Motion for Reconsideration on Summary Judgment*, showing that the trial court did not address defamation at all. (2) CBC Pattern of Character Assassination from *Declarations of Toure Bourama and Aissata Sidebe*, at CP 60-70.

Applicable to all Torts: (1) Role of the Fraudulent Inducement of the Respondent in its impacts on reputation, emotional and moral health, in breach of special relationship, and as evidence of contract. *First Declaration of Matt Mathesius* at CP 235, lines 7-22, and CP 237-39. (2) *First Declaration of Lori Mason* at CP 295-300.(3) AB at 36-37.

Proof of Special Relationship: (1) *Mr. Mason's Letter to Lee Thornton, Addendum I to First Declaration of Matt Matheius*, admitted as verified by the trial court, at CP 274-278. (2) *Declaration of Craig Mason*, at CP 318-331, and *Exhibit D* to that declaration at CP 403-407. (3) AB at 5-14. (4) AB at 36. (5) ARB at 25-27.

**Overlooked Legal Issues:** (1) The *Berg* "context rule" also applies to special relationships. ARB at 28, quoting *Adler v. Fred Lin Manor* 153 Wn. 2d 331 (2004). (2) Friendship can create special fiduciary duties in bargains. ARB at 27.

**Overlooked Factual Issues:** Issues regarding special relationships are questions of fact. ARB at 27-28.

***Scope of the Respondent's Summary Judgment Motion:***

**Overlooked Legal Issue:** The trial court stretched the Respondent's summary judgment motion far beyond the initial motion, which was confined to the standing on the third-party beneficiary issue. Respondent had not filed its motion beyond the scope of the third party issue. Cases cited at CP 11 included *R.D. Merrill v. Pollution Board*, 137 Wn.2d 118 (1999), and *White v. Kent Medical Center*, 61 Wn.App163 (1991). Summary judgment could not possibly reach these issues. CP 38-49, *Plaintiff's Motion for Reconsideration on Summary Judgment*. The trial court reached beyond the scope of the Respondent's motion.

***Third-Party Beneficiaries:***

**Overlooked Legal Issue:** The May 14, 2009, decision did not say that Mr. Mason could not contract for the benefit of third parties (contra the legal position of the Respondent and the trial court). Instead, the decision under reconsideration only stated that the Appellant did not contract for the benefit of third parties. The facts should be revisited under this proper legal doctrine.

**Overlooked Factual Issue:** Given that third-party contracts are recognized, then the *Berg* errors of the May 14 decision are all the more costly to the Appellant as error. AB 34-36. Genuine issues of material fact remain. ARB at 27, and CP 436-440, 465, and AB at 5-16.

***Pre-Agreement Wrongs versus Post-Agreement Wrongs:***

**Overlooked Legal Issue:** Contrary to the trial court, the May 14, 2009, decision does not seem to support that the waiver it imputes is a license to do wrongs into the future with impunity; therefore, the post-agreement wrongs must be explored, factually. AB at 39-40. The trial court's kind of waiver of future harms would destroy all settlement agreements. ARB at 29-30.

***CR 56(f) Issue:***

May 14, 2009 decision: "He [Mason] undertook no discovery during that time period."

**Overlooked Facts:** (1) *Supplemental Declaration of Paul Triesch*, at CP 99: "The plaintiff served four sets of interrogatories on the Defendants." First and Second Set of ROGS and RFPs appended at CP 100-173. Third Set of ROGS and RFPS at CP 90-97. (2) *Plaintiff's First Requests for Admission*, at CP 82-89. (3) *Declarations of Principal Karl Miller and of Superintendant Jeff Loe* on the burdens of time faced by Lake Roosevelt High and Mr. Mason, showing how little time Mr. Mason had for discovery, at CP 332-336. (4) AB at 40-42.

It is contradicted by the record that Mr. Mason undertook no discovery, and his reliance upon the case schedule was reasonable. Appellant's CR 56(f) motion should have been granted.

***RCW 4.84.185 Issue:***

May 14, 2009 decision:

**Overlooked Legal Standard** of "No rational basis in law or fact." AB at 42-45.

**Overlooked Facts:** (1) The trial court originally denied the Respondent's Motion for Summary Judgment. Clerk's notes at CP 50. Unless the trial judge was without rationality at that point, and then returned to rationality when it invented the waiver of all future torts, it is clear that Mr. Mason's views had a rational basis in law and/or fact, and that sanctions were logically inappropriate. (2) The May 14 decision overlooks that only the trial court's construction that Mr. Mason waived all future court actions – i.e., that the Appellant created a license for the Respondent to commit future torts with his agreement – allowed the trial court to impose RCW 4.84.185 sanctions. AB at 42-45. These facts and law should be addressed with specificity.

***ER 803 and 804 Issues:***

**Overlooked Issues of Law and Fact:** These arguments were simply not addressed in the decision of May 14, 2009. The "Farhad Packet" (exhibit B) had multiple bases for admittance, and no legal discussion was had of those multiple bases.

**CONCLUSION:** The May 14, 2009, was issued without oral argument, due to the fault of the Respondent. The Appellant has been obviously prejudiced by the lack of oral argument, in that so many vital issues of law and of fact were overlooked.

The omissions amount to a lack of due process, and the lack of an opportunity for the Appellant to be heard.

A strong and legitimate case can still be seen, above, despite the Respondent's refusal to answer four sets of discovery requests, and despite the trial court, by denying Appellant's CR 56(f) motion, cutting off the opportunity for depositions to be taken by the Appellant. (It is a matter of public record and judicial notice that in *Copland v. CBC*, Franklin Co. #08-2-50466-5, at the one-year point the docket shows the parties have stipulated to more discovery.)

Appellant respectfully requests that the court withdraw the May 14, 2009, decision, and hear oral argument with sufficient time allowed for the parties to thoroughly explore these issues before the court.

Respectfully Submitted,

/s/ Craig Mason
Craig Mason, Attorney Pro Se, WSBA#32962
N. 3007 Cincinnati
Spokane, WA 99207
509-460-0259

## APPENDIX M

Petition for Discretionary Review to:

**SUPREME COURT OF THE STATE OF WASHINGTON**

**Court of Appeals Case No. 27322-9-III**

**[Dated August 17, 2009]**

| | |
|---|---|
| Craig Mason, | ) |
| **PETITIONER,** | ) |
| vs. | ) |
| Columbia Basin College, | ) |
| Columbia Basin Board of Trustees, | ) |
| Lee Thornton, Rich Cummins, Meg | ) |
| Woods, and the marital community | ) |
| of Meg Woods and Rich Cummins, | ) |
| David Shaw and the marital | ) |
| community of David Shaw and | ) |
| Jane Doe Shaw, Deborah Meadows | ) |
| and the marital community of | ) |
| Deborah Meadows and Mike | ) |
| Grinnell, Ruben Lemos and the | ) |
| marital community of Ruben | ) |
| Lemos and Jane Doe Lemos, and | ) |
| Bill McKay and the marital | ) |
| community of Bill McKay and | ) |
| Jane Doe McKay, | ) |
| **RESPONDENTS** | ) |
| | ) |

# PETITION FOR DISCRETIONARY REVIEW

Craig Mason, WSBA# 32962
Petitioner, Pro Se
N. 3007 Cincinnati
Spokane, WA 99207
509-460-0259

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**Issue 1:** Should the legitimate tort claims of the Petitioner be dismissed by the trial court on the basis, un-argued by either party, that the Petitioner waived future torts in a settlement agreement, and should those legitimate tort claims be dismissed on appeal on the alternate erroneous basis that the Petitioner had filed no torts on his own behalf in his Complaint?
**Answer:** No, the legitimate torts of the Petitioner are clearly alleged in his Complaint; it would be a fundamental denial of due process under the State and Federal Constitutions to dismiss the Petitioner's torts by denying the existence of the plain language of the Complaint (Ct. of Appeals), or by inventing a waiver of future torts that was never contemplated by the parties (trial court). Petitioner had no opportunity to be heard. 1

**Issue 2:** Should the "context rule" of Washington case law on contracts be so dramatically narrowed that cases such as the following are effectively overruled -- *Diaz v. National Car Rental*, 143 Wn.2d 57, 17 P.3d 603 (2001); *Scott Galvanizing, Inc., v. Northwest EnviroServices*, 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993); *Pacific Northwest Group v. Pizza Blends, Inc.*, 90 Wn.App 273, 277-78, 951 P.2d 826 (1998); and *Consolidated Electric Dist. Inc .v Gier*, 24 Wn.App 671, 677-78, 602 P.2d 1206 (1979)?

**Answer:** No. These cases present a long tradition of Washington courts pursuing substantial justice in protecting legitimate contract expectancies in partially integrated contracts by using the context rule to get at the true bases of the bargains at issue. 2

**Issue 3:** Should the Petitioner, who had resumed his teaching career, be denied the ability to follow the trial schedule's discovery cut-off date (of 7/30/08), to which the Defendant had stipulated, and should have Petitioner's CR 56(f) motion been denied at the very beginning of his effective discovery period (which commenced at the end of the '07-'08 academic year, in mid-June, 2008)?

**Answer:** No. The case scheduling order that issued on 1/10/08 was deliberately set so that the Petitioner could engage in discovery during the summer of 2008, and the Petitioner's CR 56(f) motion should have been granted at the June 20, 2008 hearing. 3

**Issue 4:** Given that the trial court and the Court of Appeals failed to address nearly all of the issues Mr. Mason alleged in his complaint and raised on appeal, have the basics of due process under the State and Federal Constitutions been met?
**Answer:** No. Clearly filed claims in the Petitioner's Complaint were ignored, or flatly stated to not exist, in opposition to filed and known facts; clearly stated arguments were not addressed; the Respondent failed to appear for oral argument to further deny the rudiments of an opportunity to be heard to the Petitioner; and none of the basic requirements of due process have been met, especially when the Petitioner faces the substantial property deprivation of sanctions under RCW 4.84.185. 3

**Issue 5:** Are RCW 4.84.85 sanctions appropriate on the facts presented?
**Answer:** No. Petitioner's case had a rational basis in facts and law. 3

**Issue 6:** Should the arguments raised in the Petitioner's appeal brief, which were not addressed by the Reply, be considered conceded by the Respondent? 3
**Answer:** Yes, the well-grounded, un-rebutted, issues and arguments raised by the Petitioner should be considered to have been conceded to the Petitioner, and each is sufficient to preserve his case. 3

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*(b) CR 56(f) was not properly applied.* 11

*(c) CR 56(c) was not properly applied.* 11

*(d) Application of RCW 4.84.185 in this context is a substantial deprivation of property and liberty without due process of law.* 11

*(e) With these decisions, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a trial court, as to call for the exercise of revisory jurisdiction by the Supreme Court.* 12

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## A. IDENTITY OF PETITIONER

Craig Mason, Petitioner, asks this court to accept review of the decision or parts of the decision designated in Part B of this motion.

## B. DECISION TO BE REVIEWED

The decisions to be reviewed are: (a) the decision of May 14, 2009, which upheld dismissal of Petitioner's case on summary judgment, which upheld denial of Petitioner's CR 56 (f) motion, and which upheld sanctions under RCW 4.84.185, *Appendix* at pages *A-1 to A-11*, and (b) the denial of the Petitioner's Motion for Reconsideration. *A-12 to A-13*.

## C. ISSUES PRESENTED FOR REVIEW

**Issue 1:** Should the legitimate tort claims of the Petitioner be dismissed by the trial court on the basis, un-argued by either party, that the Petitioner waived future torts in a settlement agreement, and should those legitimate tort claims be dismissed on appeal on the alternate erroneous basis that the Petitioner had filed no torts on his own behalf in his Complaint?

**Answer:** No, the legitimate torts of the Petitioner are clearly alleged in his Complaint; it would be a fundamental denial of due process under the State and Federal Constitutions to dismiss the Petitioner's torts by denying the existence of the plain language of the Complaint (Ct. of Appeals), or by inventing a waiver of future torts that was never contemplated by the parties (trial court). Petitioner had no opportunity to be heard.

**Issue 2:** Should the "context rule" of Washington case law on contracts be so dramatically narrowed that cases such as the following are effectively overruled -- *Diaz v. National Car Rental*, 143 Wn.2d 57, 17 P.3d 603 (2001); *Scott Galvanizing, Inc., v. Northwest EnviroServices*, 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993); *Pacific Northwest Group v. Pizza Blends, Inc.*, 90 Wn.App 273, 277-78, 951 P.2d 826 (1998); and *Consolidated Electric Dist. Inc .v Gier*, 24 Wn.App 671, 677-78, 602 P.2d 1206 (1979)?

**Answer:** No. These cases present a long tradition of Washington courts pursuing substantial justice in protecting legitimate contract expectancies in partially integrated contracts by using the context rule to get at the true bases of the bargains at issue.

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**Answer:** No. The case scheduling order that issued on 1/10/08 was deliberately set so that the Petitioner could engage in discovery during the summer of 2008, and the Petitioner's CR 56(f) motion should have been granted at the June 20, 2008 hearing.

**Issue 4:** Given that the trial court and the Court of Appeals failed to address nearly all of the issues Mr. Mason alleged in his complaint and raised on appeal,

have the basics of due process under the State and Federal Constitutions been met?

**Answer:** No. Clearly filed claims in the Petitioner's Complaint were ignored, or flatly stated to not exist, in opposition to filed and known facts; clearly stated arguments were not addressed; the Respondent failed to appear for oral argument to further deny the rudiments of an opportunity to be heard to the Petitioner; and none of the basic requirements of due process have been met, especially when the Petitioner faces the substantial property deprivation of sanctions under RCW 4.84.185.

**Issue 5:** Are RCW 4.84.85 sanctions appropriate on the facts presented?

**Answer:** No. Petitioner's case had a rational basis in facts and law.

**Issue 6:** Should the arguments raised in the Petitioner's appeal brief, which were not addressed by the Reply, be considered conceded by the Respondent?

**Answer:** Yes, the well-grounded, un-rebutted, issues and arguments raised by the Petitioner should be considered to have been conceded to the Petitioner, and each is sufficient to preserve his case.

## D. STATEMENT OF THE CASE

On May 3, 2007, Mr. Craig Mason filed suit against Columbia Basin College for: (a) the Tort of Fraud, which was specifically pled; (b) Breach of Contract; (c) the Tort of Breach of Special Relationship; (d) the Tort of Intentional and Negligent Infliction of Emotional

Distress; (e) the Tort of Tortious Interference with Contract; (f) the Tort of Defamation; (g) the Tort of Interference with Future Employment; (h) the Equitable action of Restitution; and (i) the Tort of Abuse of Process. *See Complaint at A-14 to A-36.*

The following facts are summarized from the Appellant's Brief. *A-37 to A-106, esp. A-48 to A-66, and declarations cited therein, some of which are in the Appendix, without exhibits, with citation to Clerk's Papers in the briefs.*

The tort suit was filed by Mr. Mason based upon a separation agreement, with oral and written terms, finalized in late October and early November of 2003. Petitioner and the Columbia Basin College (Respondent) had worked out such that Mr. Mason would settle Petitioner's tort claim against the college, and, as a crucial basis of the bargain, the college would agree to cease and desist illegal actions against three of Mr. Mason's colleagues, and would honor Mr. Mason's sixteen years of service in teaching and administrative activities. The Petitioner and the College President (Lee Thornton) had a special relationship based upon a long friendship, and based upon Mr. Mason's numerous personal sacrifices at the request of Lee Thornton, requested by Thornton in friendship, that had the Petitioner undertake difficult administrative tasks. The settled dollar amount was small for the harms at issue, but Mr. Mason did not want to sue his former friend, and a large part of the basis of the bargain was that three of Mr. Mason's colleagues would no longer be under illegal attack by administrators whom Mr. Thornton refused to control. Consideration was exchanged, and a written document was produced that the College reassured Mr. Mason

was a mere formality drafted only as an audit requirement – the written document was less than a "partial integration" -- as the College presented that the writing was documentation aimed toward parties external to the agreement. Mr. Mason researched the law of Washington State, including *Berg v. Hudsman* and its progeny, to rest assured that the laws of the State of Washington would not allow the College to defraud him by suddenly inserting the written document in the place of the true agreement – in place of the full oral and written agreement actually made by both parties.

During the (post-signing) period of revocation of the agreement, Mr. Mason received additional oral guarantees from the College that the faculty members at issue would have no negative employment or working condition actions taken against them. The Petitioner provided the College with the additional consideration of not exercising his right to revoke the agreement in exchange for these additional explicit guarantees.

Again, Mr. Mason researched the case law of Washington to make certain that Washington law protected such agreements, including subsequent oral modifications and guarantees, especially in the context of special relationships of trust. In reliance upon the case law of Washington, Mr. Mason signed the partial integration in the fall of 2003, did not revoke the agreement, and prepared to separate from the College the next year (2004) to remove himself from the abusive environment that the College had become.

In bad faith, the College immediately broke the agreement in every significant way, beginning with

unlawful actions against the very colleagues of Mr. Mason whose protection was specifically-bargained-for, and whose employment conditions were specifically assured to Mr. Mason as the crucial "basis of the bargain" of the 2003 agreement. These representations by the College were so important that "but for" those reassurances, there would have been no agreement. One of the motives of these breaches was to attack Mr. Mason's reputation, and to inflict intentional mental distress upon Mr. Mason. The College took immoral delight in its fraudulent actions.

After working as a lawyer, shortly after the suit began, in 2007, Mr. Mason left the practice of law to teach English at Lake Roosevelt High on the Colville Indian Reservation.

On January 10, 2008, a new case scheduling order was issued, which allowed Mr. Mason to engage in discovery until 7/30/08. *A-155 to A-159*. This scheduling order was granted on the basis of the Petitioner's Motion and Declaration that he was teaching on the Colville Indian Reservation until mid-June of 2008, and on the basis that what little spare time Mr. Mason had he was required to spend on a Benton County case another attorney at his former firm had dropped (after Mr. Mason left the firm) just before the plaintiffs faced summary judgment motions and trial. *A-150-154*.

It was clear at the outset that Mr. Mason needed the summer of 2008 for discovery. Mr. Mason's 12/20/07 Declaration in Support of his Motion for a New Trial Date reads: "I will need to hold my depositions of the witnesses over the summer of 2008," because it was simply impossible to engage in

discovery until after school was out for the summer. *A-152.*

Defendant stipulated to the new trial date on 12/28/07. *A-233 to A-234.* After this motion was granted on 1/10/08, the Defendant, in bad faith, immediately filed its Motion for Summary Judgment on 3/24/08. Mr. Mason filed a request for more time under CR 56(f), based upon the facts outlined above. *A-160 to A-168.* Petitioner Mason also filed a Response to the Defendant's Summary Judgment Motion. *A-169 to A-185. (Representative supporting declarations are filed without exhibits at A-186 to A-189, and A-201 to A-232, and exhibits are available in Clerk's Papers.)*

A hearing was held on June 20, 2008. Despite the clear record that Mr. Mason relied upon the January 10, 2008, case scheduling order, and the Petitioner was counting on the month of July to perform discovery, the Petitioner's CR 56(f) motion was denied. *A-247 to A-248.*

Also, on June 20, 2008, the trial court ignored the torts that were filed by Mr. Mason in his complaint. Next, the trial court failed to apply settled Washington contract case law, by holding that the "partial integration" was a complete integration, despite genuine issues of material fact, and that the trial court found that its written waiver provisions meant that Mr. Mason had provided to the College a complete waiver of all future wrongs, torts or otherwise, that the College might ever choose to commit against Mr. Mason. *A-65 – Appellant Brief cites trial transcript.*

On this basis of this imputed waiver of all future wrongs, the trial court found that Mr. Mason's case

had no rational basis in law or fact, and sanctioned Mr. Mason under RCW 4.84.185. A hearing to set damages was ordered to be held on December 12, 2008, *A-254*, and was instead held, without notice to Mr. Mason, on September 12, 2008, and fees of approximately $28,000 were imposed against Mr. Mason.

Appeal was taken to Division III, which issued its decision on May 14, 2009. In that decision, the Court of Appeals erroneously stated that Mr. Mason had never filed any torts against the College on his own behalf. *A-7*. Further, the Court of Appeals sustained the trial court in a *sub rosa* over-ruling of Washington contract case law, by finding the agreement -- despite Mr. Mason's genuine issues of material fact -- to have been a totally integrated agreement as a matter of law. The Court of Appeals did not address the issue of the trial court's imputation of a waiver of future torts to Mr. Mason, but instead, in clear error, as shown by the Complaint, the Court of Appeals stated that Mr. Mason had never filed any torts in his Complaint on his own behalf. *A-7*. Sanctions under RCW 4.84.85 were upheld, as well, despite lack of specific trial court findings to support the sanction, and the Court of Appeals cited the language of the general waiver of the written portion to the agreement that the trial court had used to waive all future wrongs by the College against the Petitioner: "because you promised not to sue them and it was a final release of all claims, I'm granting sanctions and terms." *A-10 (citing trial court)*.

The Court of Appeals provided a different spin to this quote, given that in the trial court's oral ruling this language was also construed as a waiver of future harms committed by the College against the

Petitioner. *A-64-66*. These errors were brought to the attention of the Court of Appeals on the Petitioner's Motion for Reconsideration. *A-190 to A-200*. And the Petitioner's Motion for Reconsideration was denied, and this Petition for Review timely followed.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Fundamental Due Process Under the State and Federal Constitutions Was Not Met.

***(a) The Petitioner's tort claims were never substantively addressed by any court, at any level.*** The trial court claimed Mr. Mason had given the College a waiver of future torts, and the Court of Appeals claimed that Mr. Mason had never filed any torts on his own behalf. On this basis alone, the State and Federal due process right to bring suit was violated, and, additionally, this deprivation of access to the courts led to the additional property deprivation of RCW 4.84.185 sanctions. (See Article 1, Section 3 of the Washington State Constitution: "No person shall be deprived of life, liberty, or property, without due process of law," and the 5th and 14th Amendments to the U.S. Constitution, to the same effect.)

***(b) CR 56(f) was not properly applied.*** Mr. Mason had engaged in discovery, with requests for admission and interrogatories and requests for production having been delivered to the Defendant, and the summer of 2008 was the necessary time for Petitioner's depositions of Respondents. The Petitioner's declaration that accompanied his CR 56(f) motion, and his supplemental declaration, are clear in this regard.

*A-160 to A-168*, and see the Plaintiff's (Petitioner's) Motion for Reconsideration at *A-235 to A-246*.

It is equally clear that the College had not responded to discovery requests. *A-160 to A-168*.

***(c) CR 56(c) was not properly applied***, in that facts were construed in favor of the College, instead of against the moving party, in violation of a known right. See Petitioner's Appellant Brief at *A-37 to A-106*, and Petitioner's Appellant Reply Brief at *A-107 to A-149*.

***(d) Application of RCW 4.84.185 in this context is a substantial deprivation of property and liberty without due process of law.*** The Petitioner's settled and reasonable expectations of Washington contract law, upon which Mr. Mason relied, even without tort claims, were sufficient to prevent RCW 4.84.185 sanctions. The tort claims on his own behalf, also are sufficient to prevent a finding of a frivolous suit, and that these were all washed away by an overbroad waiver in the trial court, affirmed on appeal, deprives the Petitioner of due process of law under the State and Federal Constitutions.

***(e) With these decisions, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a trial court, as to call for the exercise of revisory jurisdiction by the Supreme Court.*** The Petitioner has been effectively denied all access to the courts, and the protections of settled law, by the irregular decisions of the lower courts.

2. The Decision of the Court of Appeals Conflicts with the Decisions of the Supreme Court, and with other Court of Appeals Decisions.

***(a) The Court of Appeals decision contradicts the entire "context rule" line of contract law cases***, including *Diaz v. National Car Rental*, 143 Wn.2d 57, 17 P.3d 603 (2001); *Scott Galvanizing, Inc., v. Northwest EnviroServices*, 120 Wn.2d 573, 844 P.2d 428 (1993); *Mutual of Enumclaw v. USF Ins.*, 164 Wn.2d 411, 191 P.3d 866 (2008); *Pacific Northwest Group v. Pizza Blends, Inc.*, 90 Wn.App 273, 277-78, 951 P.2d 826 (1998); and *Consolidated Electric Dist. Inc .v Gier*, 24 Wn.App 671, 677-78, 602 P.2d 1206 (1979).

The Petitioner's Appellant Brief cited *Diaz v. National Car Rental* for the proposition that even if the contract language is not ambiguous, extrinsic evidence may be used. *A-71.* The Court of Appeals repeats the error that the lack of a written term of the agreement means there is no such term in the total (oral and written) agreement. *A-6.* This is pure question-begging. A party alleging an oral term, by definition, cannot point to the writing to support his position – it is a question of fact.

*Scott Galvanizing* makes clear that a contract dispute such as this one is a "mixed question of law and fact," and must go to the jury. *Scott Galvanizing, Inc., v. Northwest EnviroServices*, 120 Wn.2d at 580-81.

In *Mutual of Enumclaw*, the 2008 decision is clear that a contract can only be decided as a matter of law if the facts are undisputed, and the parties agree that

the contract language applies. *Mutual of Enumclaw v. USF Ins.*, 164 Wn.2d at 425.

*Mutual of Enumclaw* and *Scott Galvanizing* both show that the Petitioner's contract case should have proceeded to the jury. *See, e.g.*, Appellant's Reply Brief, *A-136 to A-138, and cases cited therein.*

Washington law has a long tradition of getting to the real agreement, and not letting bad faith hide behind the parole evidence rule, and this tradition was re-stated with clarity, in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). *See e.g., Pacific Northwest Group v. Pizza Blends, Inc.*, 90 Wn.App 273, 277-78, 951 P.2d 826 (1998) ("A paradox of the common law is that a contract clause prohibiting oral modification is essentially unenforceable because the clause is itself subject to oral modification."), *and see Consolidated Electric Dist. Inc .v Gier*, 24 Wn.App 671, 677-78, 602 P.2d 1206 (1979) (Summary judgment reversed because debtor's sworn testimony that the creditor waived the guaranty raised a question of material fact as to whether the guarantee was orally terminated). *A-70 to A-77.*

The Petitioner raised genuine issues of material fact by the facts of his sworn complaints, and by his filed declarations and exhibits. The Court of Appeals contradicts the precedents of the Washington Supreme Court, and of other appellate decisions, by not recognizing the genuine issues of material fact under the contract causes of action.

***(b) In the alternative, the facts were not properly construed***, in conflict with settled law of all jurisdictions on summary judgment motions. If the

lower courts violated CR 56, and case law of summary judgment, and instead construed facts against the Petitioner, then that is also clearly reversible error. *Scott Galvanizing, Inc.*, and *Mutual of Enumclaw v. USF Ins., supra*, show that such contract questions are issues of fact. And under Washington law, summary judgment must be denied if a right of recovery is indicated under any provable set of facts. *Fleming v. Smith, 64 Wn.2d 181,* 390 P.2d 990 (1964).

The Court of Appeals wrote: "The separation agreement expressly released any claims he [Petitioner] may have against CBC." This misconstrues the facts. The writing expressly released the College, but the whole agreement (oral and written terms, together) did not release the College from further obligations. *A-37 to A-149. See, e.g., Kelly Springfield Tire Co. v. Faulkner*, 191 Wa. 549, 554-556, 71 P. 2d 382 (1937) (A contract could be orally modified despite a contractual prohibition on such modifications because it was settled law that "...a contract may be modified or abrogated by the parties thereto in any manner they choose, not withstanding provisions therein prohibiting its modification or abrogation except in a particular manner," at 556).

It was clear error for the lower courts to fail to recognize the questions of fact that exist under Washington law.

Next, the Court of Appeals wrote: "However, there is nothing in the agreement we can possibly interpret to include protection of the three named teachers as a condition of the separation agreement." *A-6.* Again, this is a clear question-begging response to the Petitioner's genuine issues of material fact. There is

nothing in the written agreement, which was always presented to the Petitioner as a document not important between Mr. Mason and the College, but as only important between the College and third parties. The *total agreement* included the explicit oral understanding that "but for" the assurances for the employment security of the three teachers at issue, Mr. Mason could not agree to leave the College, and to settle his tort claim. *A-14 to A-149, and A-169 to A-189, and A-201 to A-232.*

Next, the trial court's decision is then misconstrued by the Court of Appeals, which writes: "Mr. Mason contends that interpreting the contract in this manner authorizes CBC to commit torts. That is incorrect." *A-7.* Instead, what the Petitioner argued was that it was wrong for the trial court to waive all possible suits by Mr. Mason against the College, past and future, as it construed the writing at issue. The trial court explicitly ignored any distinction between past wrongs and future wrongs, and between torts and contracts. It held that the writing (agreed by the parties to not apply to them) was a complete integration binding on Mr. Mason, and that Mr. Mason agreed to never sue the College, ever, which included post-signing torts. *A-65 – Appellant Brief cites trial transcript.*

Next, the Court of Appeals, discussing the Petitioner's CR 56(f) motion writes: "Mr. Mason ...undertook no discovery during that time [spring of 2008]. *A-8.* That assertion was flatly contradicted by the record. *A-150 to A-158.* The trial court abused its discretion not to allow the Petitioner to undertake discovery in the summer of 2008, and the Court of Appeals committed clear error with its incorrect

account of unchallenged facts that were exactly opposite of its holding.

The Court of Appeals failed to meet the rudiments of protecting due process under the State and Federal Constitutions, in that the Petitioner's facts were not heard, even the unchallenged facts, and the laws were not properly applied, and many of the Petitioner's causes of action were simply ignored. There was no opportunity to be heard, and no proper legal process.

***(c) With facts properly construed, the Petitioner also has the right to sue on behalf of third-party beneficiaries, and on the law of special relationships.*** *See esp.* Appellant's Reply Brief at *A-138 to A-142*, and *cases cited therein, e.g., Liebergesell v. Evans*, 93 Wn.2d 881, 890-92, 613 P.2d 1170 (1980) (special relationships are factual questions for the jury).

3. Substantial Public Interest is Conceptually and Practically Implicated.

The College immediately contacted the media with the Court of Appeals decision, prior to the Petitioner receiving the decision, and an extensive public discussion of the case followed in the local media. *See* Petitioner's (Appellant's) Motion for Reconsideration of the May 14, 2009, Decision, *A-190 to A-200, esp. A-197.*

There are numerous other suits against the College, due to the similarly abusive human resource practices that Mr. Mason had prevented for years. *See, e.g., A-14 to A-36; A-201 to A-210; and A-219-232.* These abuses are the very practices that led Mr. Mason to leave the College because he could no longer

stop them from occurring, without working to get his friend, President Thornton, fired. *Id.*

The lower courts of the judicial system foreclosing such suits to abused parties, by denying fundamental due process, is a matter of substantial public interest.

4. Other Substantial Errors of the Court of Appeals.

There was no due process on the question of fraud, which could not be precluded by finding the writing to be a total integration. *See* Reply Brief of Appellant at *A-135 to A-138.* The College even admitted they had no defense to Fraud. *Id.* And Fraud was specifically pled in the Complaint. *A-31 to A-32. See, also, e.g., Haberman v. WPSS,* 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987) ("Thus, while a duty in a fraud case may be owed by a defendant to plaintiffs in privity, a fiduciary relationship, or a limited class of persons, a duty may also arise to those third persons whom the defendant intends or has reason to expect will receive the information, especially in a business transaction where a defendant has knowledge necessary to prevent misrepresentation, or facts basic to the transaction where the plaintiff would reasonably expect disclosure").

The evidentiary errors of the trial court were not fully addressed as briefed, especially the Petitioner's personal knowledge of the materials in the Farhad Packet, excluded by the trial court, was over-looked or ignored, as were other legal arguments. *A-88 to A-91.*

5. Summary: A Basic Opportunity to Be Heard, and Basic Due Process Were Not Provided to the Petitioner.

From the removal of the protections of settled law -- upon which the Petitioner has relied, to his detriment -- to the lower courts ignoring substantial, verified, and un-rebutted, legal and factual claims of the Petitioner, basic due process has not been provided.

These claims impact a matter of substantial public significance, as can be developed further as more of the record is forwarded for review by the Washington Supreme Court.

The decisions of the lower courts substantially deviate from the law of Washington as established by its highest courts, and produce a result that contradicts settled legal and constitutional expectations. This case is a proper use of the Supreme Court's resources to review.

## F. CONCLUSION

The Supreme Court of the State of Washington should accept review for the reasons indicated in Part E, and reverse the dismissal of this case on summary judgment, thus voiding the RCW 4.84.815 sanctions, and the Supreme Court should remand this case for trial, with a scheduling order that allows generous time for discovery.

August 17, 2009

Respectfully submitted,

/s/ Craig Mason
Craig Mason, WSBA#32962
Petitioner Pro Se

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## APPENDIX N

REPLY on Petition for Discretionary Review to:

**SUPREME COURT OF THE STATE OF WASHINGTON**

**Court of Appeals Case No. 27322-9-III**

**[October 11, 2009]**

| | |
|---|---|
| Craig Mason, | ) |
| **PETITIONER,** | ) |
| vs. | ) |
| Columbia Basin College, | ) |
| Columbia Basin Board of Trustees, | ) |
| Lee Thornton, Rich Cummins, Meg | ) |
| Woods, and the marital community | ) |
| of Meg Woods and Rich Cummins, | ) |
| David Shaw and the marital | ) |
| community of David Shaw and | ) |
| Jane Doe Shaw, Deborah Meadows | ) |
| and the marital community of | ) |
| Deborah Meadows and Mike | ) |
| Grinnell, Ruben Lemos and the | ) |
| marital community of Ruben | ) |
| Lemos and Jane Doe Lemos, and | ) |
| Bill McKay and the marital | ) |
| community of Bill McKay and | ) |
| Jane Doe McKay, | ) |
| **RESPONDENTS** | ) |
| | ) |

# PETITION'S REPLY ON DISCRETIONARY REVIEW

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**Statute Cited:** RCW 4.84.815 17, 20

## I. IDENTITY OF PETITIONER IN REPLY

Craig Mason, Petitioner, herein Replies to the Answer of CBC, et al.

## II. CRITIQUE OF RESPONDENT'S CHARACTERIZATION OF THE ISSUES IN ANSWER -- REPLY

In this limited space, three categories of Respondent's misrepresentations in its Answer shall be addressed: (A) the Petitioner's issues were never addressed by the courts, below,[1] and the Respondent presented non-issues (issues that were never the concern of the Petitioner)[2] to mislead the court; (B) because of the foregoing, relief granted by the trial court went beyond the scope of the Respondent's motion for summary judgment,[3] and the Respondent's misstatement of the issues precluded the Petitioner from receiving an opportunity to be heard, in violation of State and Federal basic Due Process; and (C) upholding the trial court's decision overturns the established contract law of Washington state, and violates basic due process, while upholding the Court

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[1] CP 591-655: Transcript of June 20, 2008 hearing. (CP = "Clerk's Papers"); and Opinion of the Court of Appeals, Petition Appendix at A-1 to A-11.

[2] See Discussion of Respondent's Answer, infra, and Respondent's Response Brief in the Court of Appeals.

[3] The sole substantive issue raised by the Respondent in its CR 56 motion was the issue of "Whether Mason has standing to sue for damages where the College allegedly took actions toward three faculty members after his resignation." CP: 515. By definition, no other issue could be properly addressed by the court beyond the scope of the motion.

of Appeals' miscasting of the trial court's decision differently, but in a manner equally violative of due process, overturns the existing contract law of Washington state, and deprives the Petitioner of an opportunity to be heard, in abrogation of State and Federal due process rights.

## A.1. The Basic Facts Summarized

The Respondent's Answer materially misstates the facts.

Mr. Craig Mason began work at Columbia Basin College in 1988, after working for Preston Thorgrimson in Municipal Law, and after serving on the U.W. Law Review, following his lifelong interest in education.[4]

In 1992, Mr. Mason, then union president, was dragged in to the defense of Dave Abbott on false sexual harassment charges.[5] (The local Uniserv reps were insufficiently defending Mr. Abbott in providing "due process" without factual investigation.) Mr. Mason dug out the facts to show that the charges were not true. Subsequently, Mr. Mason remained active in CBC administrative matters, on both the faculty side,

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[4] CP: 482-483, Deposition of Craig Mason.

[5] Petition for Review, Appendix 48-60 contains the Brief of Appellant (Petitioner) which extensively cites the Clerk's Papers from which these facts are drawn, *and see* CP: 301-315, Plaintiff's Response to Defendant's Summary Judgment Motion, and other declarations and exhibits cited therein, see esp. Declaration of Craig Mason, and exhibits, CP: 318-448. The facts summarized in this section are each cited to Clerk's Papers in prior filings. Only vital or new citations will be referenced in this section.

and on the administrative side, until Mr. Mason's departure from CBC in 2004.

When a new president, Lee Thornton, arrived in 1995, he was very dependent upon Mr. Mason because Lee Thornton did not fire the abusive managers of the previous regime, and so he counted on Mr. Mason to control these abusive managers. Two years later, Mr. Mason, taught fulltime at EWU in 1996-97 (and still taught at CBC, part-time, that year), after which EWU offered Mr. Mason immediate tenure to remain at EWU. Lee Thornton asked Mr. Mason to come back to CBC to help him with difficult projects, from accreditation, the governance self-study, and assessment. Lee Thornton relied upon Mr. Mason's friendship with him to make this request, and Mr. Mason returned to CBC.

After Mr. Mason returned to CBC, the Petitioner continued to handle difficult assignments for Lee Thornton, out of friendship and out of concern for CBC, while nonetheless still suffering continuous character assassination from the CBC administrators, whom Lee refused to control.

Finally, Mr. Mason had reached his moral limit in that: (a) one Trustee tried to blackmail Mr. Mason to not run for elective office, apparently believing some of the decade-long character assassination of Mr. Mason, and, (b) at nearly the same time, Lee Thornton had decided to cover-up a likely cheating scandal on the exit exam for English composition, and Lee Thornton offered Rich Cummins (until then an ally of Mr. Mason's) a guarantee of a community college presidency if Rich would side with Lee, against Mr.

Mason, regarding the duty to investigate the cheating scandal.

Morally weary, Mr. Mason filed his tort claim in 2003 to form a basis for negotiating his exit from CBC, if the filing itself would not shock Lee Thornton into good behavior.[6] Given his ethics, Mr. Mason would not have even considered leaving CBC if the faculty under current abusive attack could not be guaranteed their career safety – this fact was known and acknowledged by Lee Thornton at each step of the negotiations in 2003. Mr. Mason had to protect faculty every year, from 1992 until 2003, from wrongful character assassination of the "target" faculty, followed by attempts to fire them. It was absolutely clear that as a matter of his personal ethics, Mr. Mason would not have left CBC without this guarantee that no wrongful or negative personnel actions would be taken against Matt Mathesius, Farhad Arshad, or Cliff Wakeman.[7]

These guarantees of protection of those three faculty were explicitly made by CBC, and were the fundamental basis of the bargain for Mr. Mason signing the partial integration of the full oral agreement between the parties. These guarantees were made again by Lee Thornton after the signing of the document, and during its period of revocation.

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[6] The 2003 tort claim is not contained in these filings. The 2006 tort claim that precedes the filing of this suit is at CP: 508-510. A motion is being made to enter the 2003 claim.

[7] See also the First Declaration of Matt Matheius, and exhibits, CP: 230-94, and First Declaration of Lori Mason, CP: 295-300.

Without these additional guarantees, Mr. Mason would have revoked the agreement.[8]

Mr. Mason then began performing his portion of the agreement, and CBC immediately broke their terms of the agreement and tried to fire Farhad Arshad by placing false materials in his personnel file.[9] And CBC tried to harass Mr. Mathesius into quitting, and then attempted to fire Mr. Mathesius. Farhad Arshad was able to keep his job as Mr. Mason helped Mr. Arshad, in early 2004, prove that the materials in his file were falsified, but given on-going harassment Mr. Arshad filed federal suit against CBC. Mr. Mathesius received a settlement from CBC, after filing a tort claim and after winning a grievance in the summer of 2004.

Mr. Mason's friendship with Mr. Arshad was largely destroyed by CBC's actions, as Mr. Arshad had insisted in 2003 that CBC was lying to Mr. Mason; however, Mr. Mason could not believe that Lee Thornton would breach their special relationship in this manner. Mr. Mason's friendship with Mr. Mathesius was also eroded by these deliberate actions of CBC, for the same reasons.

In its Answer, the Respondent makes a mockery of these lost friendships by acting as if the friendships

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[8] Although the Petitioner is trying to not redundantly repeat all factual citations, given its importance, the court is reminded that this can be found in First Declaration of Matt Matheius, and exhibits, CP: 230-94, and First Declaration of Lori Mason, CP: 295-300, and Declaration of Craig Mason, CP 318-448, and in the Complaint, CP: 545-67.

[9] See fn.8. The facts in the following paragraphs can be found in fn.8 materials.

were damaged before the betrayal of Mr. Mason by Lee Thornton. (Answer at p.4.) CBC's actions against these faculty were undertaken to directly contradict assurances that Lee Thornton induced Mr. Mason to give these three faculty members – based upon this special relationship, Mr. Mason put his reputation on the line to these friends and colleagues, with damaging results.[10]

The behavior of CBC directly and intentionally deprived Mr. Mason of the benefit of his bargain with CBC, and was done to intentionally inflict reputational and emotional harm on Mr. Mason, and this suit followed. A suit in contract, tort, fraud, breach of special relationship, and restitution was filed by Mr. Mason in 2007, after no informal resolution could be reached.[11] Given that the agreement had oral and written elements, the statute of limitations was three, not six, years.

The trial court, on June 20, 2008, in contravention of Washington law, declared that (a) the written partial integration was a complete integration of the agreement between the parties, and (b) that the waiver portion of the written agreement waived actions for future torts, as well as for past wrongs. Mr. Mason was also sanctioned.

The court of appeals upheld the trial court, declaring (a) that the partial integration was a

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[10] Declaration of Lori Mason, CP: 298-300; First Declaration of Matt Mathesius, CP 230-294, esp. 235-249; Declaration of Craig Mason, CP: 318-448, esp. 320-31.

[11] Complaint, CP: 545-67.

complete integration, and (b) that Mr. Mason had only filed a contract action, and ignored that the Petitioner had alleged torts. (Court of Appeals decision at p.7) The Respondent failed to appear for oral argument in the court of appeals, and oral argument was then cancelled. Had oral argument been held, perhaps these misunderstandings could have been cleared up. Instead, Mr. Mason had no opportunity to be heard on the issues completely omitted from consideration by the court of appeals (and omitted from its opinion).

Mr. Mason was thus deprived of basic due process, was deprived of the protections of the settled contract law of this state, was deprived of the protections of the law of fraud in this state, and was deprived of relief under the tort laws of this state, and, on all these issues, was denied an opportunity to be heard.

### A.2. Respondent's Misleading Presentation of Red-Herring Issues

The Respondent continually relies on a "pun" to misstate the issues.[12] The "writing" was presented to Mr. Mason by CBC as representing a document of interest between CBC and the state, and while the writing contained the separation date of the parties, and writing contained the exchange of sums to be made between CBC and Mr. Mason, the writing was not the Full Agreement between Mr. Mason and CBC,

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[12] This "fallacy of four terms" puns on "contract" as the partial integration versus the full contract at issue (the Full Agreement includes oral terms). This rhetorical tactic can be found in the Defendant's Motion for Summary Judgment, CP: 512-520; the Respondent's Response Brief in the Court of Appeals; and in the Respondent's Answer currently filed. The "writing" (partial integration) is not the Full Agreement. Conflating them is inapt.

as the Full Agreement included oral terms. (All facts are to be construed in Mr. Mason's favor, under CR 56, as this Petition initiated on the Respondent's summary judgment motion.)

**The "writing" is <u>not</u> the Agreement,** and is not the "contract" when "the contract" is properly construed as the Full Agreement.

The Agreement (in totality of oral and written terms) included the specific protections of faculty members Arshad, Matthesius, and Wakeman. The Petitioner created a genuine issue of material fact on this matter.

Yet, the Respondent continues to "pun" on the "writing" versus the "Agreement," for example, when Respondent states that the agreement "did not mention any other teacher." (Answer at p.1)

The Agreement at issue was explicitly bargained for the benefit of the three faculty, even though the "writing" (partial integration) does not mention them. The Full Agreement had oral terms at its center.

The Respondent states that Mr. Mason has presented only "vague statements" that there were oral terms to the Agreement. (Answer at p.2) This is flatly false. Mr. Mason created genuine issues of material facts on this matter.[13] As a matter of the law of contract, the law of special relationships, and the

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[13] See, e.g., Declaration of Lori Mason, CP: 298-300; First Declaration of Matt Mathesius, CP 230-294, esp. 235-249; Declaration of Craig Mason, CP: 318-448, esp. 320-31.

law of fraud, Mr. Mason had issues that are deserving of factual determination by a jury.

The Respondent next states that "Mr. Mason claimed various torts, but supplied no admissible evidence to support them." (Answer at p.2) However, this admission that Mr. Mason filed torts elides the fact (1) that the trial court held that the integration waived all claims Mr. Mason might ever have against CBC, including future torts, (2) that the court of appeals stated that Mr. Mason had not alleged any torts, and (3) that even the Respondent conceded in its Answer that if Mr. Mason alleged fraud, the case should go forward. (Answer at p. 10, and p.13)

The Respondent proceeds to radically misstate the facts in its "Counterstatement of the Case." The Respondent states: "A comprehensive, fully integrated separation contract governed his resignation." (Answer at p.3) This is precisely the issue to be determined at trial. On a summary judgment motion, given the responsive affidavits filed by Mr. Mason, the Respondent is not entitled to the facts being construed in its favor. Genuine issues of material fact remain.

The Respondents return to their "pun" strategy when they write: "Mason admits that the contract does not mention Mathesius, Arshad, and Wakeman." (Answer at p.4) Of course, this is a materially misleading reference to Mr. Mason's "admission." The writing, presented to Mr. Mason as being written for CBC, vis-à-vis the State of Washington, is not the FULL "contract." Mr. Mason simply acknowledged that the partially integrated writing did not mention the three faculty members.

The Full Agreement between the parties would not have occurred "but for" the oral terms (and post-signing oral guarantees) protecting the three faculty members. It was the basis of the bargain.

The Respondent then again materially misleads the court by stating: "the only basis [Mr. Mason] has ever offered to support his perceived right to proceed on their behalf is that he purportedly 'spent years deeply involved in defending people.'" (Answer at p. 4) This is flatly untrue.

The Petitioner presented extensive affidavits that showed that the protection of these three faculty members were personally guaranteed to Mr. Mason, by Lee Thorton, by virtue of his powers as CBC president, and by virtue of the special relationship between Thornton and Mason. Genuine issues of material fact existed.

The Respondent's "pun" defense should fail.

This "pun" approach continues throughout the Respondent's Answer. For example, "[Mason] admits that the contract does not mention them or any other third party." (Answer at p. 6) The "pun defense" is not made meritorious by repetition.

The Contract is the Complete Agreement (oral terms, which are partially integrated in a document that was always presented to Mr. Mason as a matter for CBC and the state, not for CBC and Mr. Mason), and the "contract" to which the Respondent continually refers is the partial integration, which was always acknowledged by CBC and by Mr. Mason as <u>not</u> the Full Agreement. The clear intentions of the parties

(barring fraud by CBC) were to never count the writing as the Full Contract.

On facts, properly construed under CR 56, Mr. Mason was induced to leave CBC on the basis of an oral contract, which was partially integrated, that included protections for Mr. Arshad, Mr. Mathesius, and Mr. Wakeman. CBC knew that Mr. Mason had offered these men his own personal guarantees, based upon Thornton's promises, which these faculty accepted, given Mr. Mason's reputation for integrity.

With fraudulent intention aforesight, or immediate and malicious intention to breach, CBC attacked these faculty in 2004 and 2005, inflicting foreseeable harm on Mr. Mason, and creating other damages. CBC also proceeded to defame Mr. Mason. These actions breached contract law, special relationship law, tort law, and restitutionary principles of Washington law, and the suit was proper.

**A.3. Begging the Question via the "Pun Defense" – A Pervasive Attempt to Avoid the Genuine Issues of Material Fact**

The Respondent ceaselessly relies upon this "pun defense" to beg the question -- to assume the very thing that is in contention. As a last example, the Respondent writes: "This [third party beneficiary] argument is meritless because the contract unequivocally shows that there are no third party beneficiaries." (Answer at p. 7)

Again, the true "contract" at issue is the Full Agreement (oral terms included) upon which Mr. Mason is suing. The Respondent uses "contract" to

mean only the writing that the Respondent College had told Mr. Mason was insignificant as to him, and yet the Respondent draws conclusions as if "contract" means the Full Agreement that includes the oral terms upon which the Respondent reassured Mr. Mason that he could rely. In this manner, the Respondent again "puns" the writing into the Full Agreement, against a proper construction of the facts under CR 56.

The Respondent has relied upon the deceptive power of the question-begging "pun defense" at all levels of court consideration in this case. This attempt to obscure the genuine issues of material fact, regarding the oral terms of the contract at issue, should fail.

The question-begging becomes all the more remarkable when the Respondent joins the Court of Appeals in declaring what the oral terms would not be, if they existed! The Respondent writes: "As noted by the Court of Appeals there is nothing in the contract that the court can possibly interpret to include protection of the three named teachers as a condition of the separation contract." (Answer at p. 10) Again, the Full Agreement contained these terms, and under the law of Washington it is a question of fact whether such terms existed, and so it is inapt for the Respondent to "pun back" to "contract" (just the partial integration) to assert what terms the Full Agreement (the full contract) would have been.

The Petitioner asks the Court to be vigilant in steering clear of the myriad logical traps of the question-begging inherent in the Respondent's pun between "contract" (partial integration) and "contract"

(Full Agreement, including oral terms) with which the Answer is riven.

### A.4. The Puns Continue in "Objective" versus "Subjective" Intentions – Thornton and Mason Had a "Meeting of the Minds"

The Respondent puns the distinction in the law between "objective intentions" which would be those known to both parties (whether stated in oral or written terms) and "subjective intentions" which certainly cannot be the basis of a contract. (Answer at p. 12) However, "objective" does not mean only written. (So here, the pun is between "written = objective" and "objective" as actually agreed intentions.)

When Lee Thornton absolutely guaranteed Craig Mason that he could rely upon the oral terms protecting the three faculty members before Mr. Mason entered the agreement, those terms were "objective" terms under Washington contract law (see contract law discussion, below). Again, the Respondent puns back to the partial integration as the "contract" to pretend that the partial integration can be a full comment (which it logically cannot) on the Full Contract. (Answer at p.13)

## B. The Trial Court's Relief Went Beyond the Scope of the Respondent's Motion

The Respondent had only brought their summary judgment motion on the partial integration issue in the trial court.[14] No relief beyond that scope was

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[14] CP:515, Defendant's Statement of Issues on Defendant's Motion for Summary Judgment. (The Defendant's only substantive issue

appropriate. In the oral hearing, Mr. Mason noted that "there are other wrongs to me alleged," but then proceeded to CR 56 hearing on the basis that only the contract claim was at issue.[15]

However, the trial court adopted the view that the partial integration was (a) a full integration and (b) that the waiver in the partial integration also meant that Mr. Mason waived all causes of action for future torts committed by CBC against him.[16]

Because the court of appeals recast the decision of the trial court, this issue was not addressed, and, instead, Mr. Mason's Complaint was miscast, and his torts were ignored. The court of appeals' decision states that "Mr. Mason contends that interpreting the contract in this way [recast only as a *Berg* issue] authorizes CBC to commit torts. This is incorrect." (Court of Appeals decision at p.7) Mr. Mason had no such "contention." It was the trial court's literal decision that the waiver in the written portion of the agreement meant that Mr. Mason could "never" sue CBC.[17]

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on summary judgment was Mr. Mason's standing to sue on third party claims.)

[15] CP: 614. See also Brief of Appellant at 38-39, where this was raised again.

[16] CP: 642.

[17] CP: 642. It was the trial court that granted the relief beyond the scope of the Defendant's (Respondent's) Motion, and this sweeping waiver of future torts was what was appealed, and then the tort claims of Mr. Mason were miscast and ignored by the Court of Appeals.

The Respondent is misleading to write: "The tort claims alleged by Mason that were personal to him were unsupported by admissible evidence." (Answer at p.14). Mr. Mason's personal torts were not a proper subject of the Respondent's initial CR 56 motion.[18] The trial court subsumed Mr. Mason's personal torts under the contract question by holding that there were no oral contract terms, and that in the full integration, Mr. Mason had waived the right to file any future claims regarding any future torts committed by CBC or its agents, and yet Mr. Mason had filed specific affidavits regarding personal torts, as well.[19]

The court of appeals then simply failed to address the issue of Mr. Mason's personal torts once the court of appeals recast the trial court's decision.

To avoid the "fallacy of four terms," (invalid conflation of distinct concepts) the actual usage of "contract" must mean the Full Agreement (including oral terms). Since this was the Respondent's CR 56 motion, the facts should be construed in Mr. Mason's favor, and on his affidavits, such oral terms existed, and the writing was a partial integration of a Full Agreement (which included oral terms). The Respondent tries to confound the court by using the partial integration to mean "contract" as if the partial integration is the Full Agreement.

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[18] CP: 614. Brief at 38-9.

[19] Second Declaration of Matt Mathesius, CP: 73-74; First Declaration of Craig Mason, supra; and un-rebutted, sworn claims in the Petitioner's Complaint.

On the Respondent's CR 56 Motion, they are not allowed to "beg the question" in ways that construe the facts in their favor. This logical and legal error permeates the case to date.

On that understanding, Mr. Mason's personal torts were never properly addressed at any level.

Additionally, the Defendant's Motion for Summary Judgment was scoped by their sole issue of the third party beneficiary issue, which leaves the remainder of the Plaintiff's case unchallenged (and which the trial court should have left intact), which makes RCW 4.84.185 sanctions inappropriate, as an entire case must be frivolous for sanctions to apply. *See, e.g., Whetstone v. Olson,* 46 Wash.App. 308, 314, 732 P.2d 159 (1986) (Reversing sanctions because "The plain language of the statute provides that the determination that an action is frivolous shall be made only after the judge has considered the action as a whole").

### C. Washington's Contract Law Would Be Revolutionized by the Court of Appeals' Decision in this Case

The entire "context rule" of Washington case law would be overturned if the Court of Appeal's decision is upheld, as would long-standing jurisprudence regarding what is a question of fact. *See, e.g., Berg v. Hudesman,* 115 Wn.2d 657, 801 P.2d 222 (1990) ("We thus reject the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible. Cases to the contrary are overruled"). And *see, e.g., Diaz v. National*

*Car Rental*, 143 Wn.2d 57, 17 P.3d 603 (2001). The *Diaz* court wrote:

> Extrinsic evidence may be used whether or not the contract language is ambiguous. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996) (citing *Berg*, 115 Wn.2d at 669).

143 Wn. 2d at 66-67. With the facts properly construed under CR 56, Mr. Mason has created genuine issues of material fact under Washington law.

*See also., Pacific Northwest Group v. Pizza Blends, Inc.*, 90 Wn.App 273, 277-78, 951 P.2d 826 (1998) ("A paradox of the common law is that a contract clause prohibiting oral modification is essentially unenforceable because the clause is itself subject to oral modification.") Mr. Mason not only created a genuine issue of material fact regarding the Full Agreement (versus the "writing") prior to signing the partial integration, but Mr. Mason has created genuine issues of material fact regarding the post-signing agreements and guarantees, which are outside of the writing entirely (even if the writing is mistaken for a complete integration.) During the period of revocation, Mr. Mason received additional guarantees that were consistent with the "meeting of the minds" regarding the career safety of the Petitioner's colleagues.

While Mr. Mason sees these guarantees as consistent with the Full Agreement, the long-standing law of Washington allows for post-signing oral modifications. *Pacific Northwest Group v. Pizza Blends, Inc.*, 90 Wn.App 273, 277-78, 951 P.2d 826

(1998) , and *see, e.g., Consolidated Electric Dist. Inc .v Gier,* 24 Wn.App 671, 677-78, 602 P.2d 1206 (1979) (Summary judgment reversed because debtor's sworn testimony that the creditor waived the guaranty raised a question of material fact as to whether the guarantee was orally terminated). *Scott Galvanizing* makes clear that a contract dispute such as this one is a "mixed question of law and fact," and must go to the jury. *Scott Galvanizing, Inc., v. Northwest EnviroServices,* 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993).

To dismiss Mr. Mason's sworn testimony, and then his claim, on summary judgment, would over-rule these cases. Cases reaching back to 1937 would be over-ruled by upholding this dismissal. *See, e.g., Kelly Springfield Tire Co. v. Faulkner,* 191 Wa. 549, 554-556, 71 P. 2d 382 (1937) (A contract could be orally modified despite a contractual prohibition on such modifications because it was settled law that "...a contract may be modified or abrogated by the parties thereto in any manner they choose, not withstanding provisions therein prohibiting its modification or abrogation except in a particular manner," at 556), as would recent case law *King v. Rice,* 146 Wash.App. 662, 670, 191 P.3d 946 (2008) (Whether a contract is fully integrated is a question of fact); *see also Flower v. TRA Industries,* 127 Wash.App. 13, 33, 111 P.3d 1192 (2005): "Mr. Flower has presented a genuine issue of fact as to whether Mr. Hunt had any intention of keeping his promise when it was made...The parol evidence rule does not apply to these facts. Mr. Flower has, at a minimum, presented a question of fact as to whether the parties intended the June 4 agreement to be a final expression of a fully integrated agreement and the parties' for-cause agreement survived by merger."

Given space constraints, the Petitioner must rest upon his Petition, and his Brief and Reply from the Court of Appeals, and Appendix.

## III. CONCLUSION: QUESTIONS OF FACT AND SCOPE OF THE DEFENDANT'S MOTION REQUIRE REVERSAL AND TRIAL

The Petitioner has not received due process. The issue of the scope of the Defendant's motion was raised in the trial court, and in the court of appeals. Brief at pp. 38-39. *White v. Kent Med. Ctr, Inc.*, 61 Wn.App 163, 168, 810 P.2d 4 (1991) (allowing the moving party to raise new issues in rebuttal materials gives the non-moving party no opportunity to respond). Well-established case law setting out when questions of fact exist in contract, fraud, and special relationship law were ignored by the courts below, as were the personal torts raised by Mr. Mason (and which received no proper motion against them). Finally, RCW 4.84.185, without proper application, amounted to a substantial deprivation of property, without due process of law.

The Petitioner requests that the Supreme Court of Washington remedy these fundamental procedural and substantive wrongs, and return this case for trial.

Respectfully submitted,

/s/ Craig Mason
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